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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

Nos. 41 and 59

THE CHOCTAW NATION AND THE CHICKASAW NATION,
Petitioners,
VERSUS
STATE OF OKLAHOMA, ET AL.,
Respondents.

THE CHEROKEE NATION OR TRIBE OF INDIANS IN OKLAHOMA,
Petitioner,
VERSUS
STATE OF OKLAHOMA, ET AL.,
Respondents.

CONSOLIDATED BRIEF FOR RESPONDENTS ANSWERING THE BRIEF OF THE CHEROKEE NATION OR TRIBE OF INDIANS IN OKLAHOMA, AND THE BRIEF OF THE CHOCTAW AND CHICKASAW NATIONS, PETITIONERS, AND THE BRIEF FOR THE UNITED STATES, AS AMICUS CURIAE

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OPINION BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 402 F.2d 739. A copy of the orders of the District Court for the Eastern District of Oklahoma and of its judgment are included in the Joint Appendix at pages 107a-116a inclusive, pages 117a and 118a, pages 119a and 120a, and at page 126a.

JURISDICTION

The jurisdictional requisites are set forth adequately in the briefs of Petitioners.

CONSOLIDATION OF BRIEF

This was one case in the District Court and was treated as one case in the Court of Appeals, and was consolidated by Order of this Court April 21, 1969. Respondents file a consolidated brief answering the brief of The Cherokee Nation or Tribe of Indians in Oklahoma (designated hereinafter sometimes as "the Cherokees"), answering the brief of The Choctaw and Chickasaw Nations (designated hereinafter sometimes as "the Choctaws"), both of said petitioning parties also being designated hereinafter sometimes as "Petitioners," and answering the brief for the United States as *Amicus Curiae*. The purpose of consolidation is to avoid needless repetition, for though the Cherokee claims and the Choctaw claims are based on different treaties and patents, the legal principles in the interpretation thereof are the same.

The length of this brief is due to the necessity of answering several briefs and to the omission of important information from the briefs filed by Petitioners.

QUESTION PRESENTED

Respondents controvert the statement of the "Questions Presented" in the Brief of the Cherokees and the statement of the "Questions Presented for Review" in the Brief of the Choctaws, and the statement of the "Question Presented" in the Brief for the United States as *Amicus*

Curiae, on the ground that each of those statements ignores the real question which Respondents submit is this:

> In the treaties with the Cherokees and the Choctaws, and in the patents authorized by the treaties, did the United States definitely and plainly express an intention to convey the river bed of the navigable Arkansas River in Oklahoma below its confluence with the Grand River?

STATEMENT OF THE CASE

This is an action to quiet title and for an accounting. It was filed in December, 1966 by the Cherokees against Respondents. The Choctaws intervened. No suit involving this subject matter had been filed before that time by either. The Cherokees and the Choctaws asserted conflicting claims. Respondents, the State of Oklahoma and its lessees, filed answers and cross-petitions to quiet title against the Cherokees and the Choctaws.

The subject matter of the litigation is certain land in Oklahoma consisting of the bed of the Arkansas River from its confluence with the Grand River to the Oklahoma-Arkansas state line. The navigability of this stretch of the river was not disputed in the Court of Appeals.

The Cherokees claim under certain treaties with the United States contained in the Statutes at Large and under a patent. The Choctaws also claim under certain treaties with the United States contained in the Statutes at Large and under a patent.

Oklahoma claims the bed of this navigable stream by virtue of its sovereignty and admission to the Union on an

equal footing with the original states, there having been no prior disposal of this navigable stream by the United States, and has asserted its ownership actively since statehood on November 16, 1907.

The District Court and the Court of Appeals construed the treaties and patents and held that they did not provide for conveyance of the river bed to either of Petitioners and that title is vested in the State. In view of this holding, there was no necessity for either court to express any opinion on the conflicting claims of Petitioners.

ARGUMENT

SUMMARY OF ARGUMENT

1. Oklahoma acquired title to the river bed of the navigable portion of the Arkansas River upon being admitted to the Union in 1907. Prior to that time the United States had not conveyed the river bed to the Cherokees or the Choctaws. This part of the river was frequently used as a highway of commerce, at least, as early as 1824. See pre-trial order filed September 25, 1967—Joint Appendix, page 113a. Oklahoma is a part of the territory acquired by the United States from France through the treaty of April 30, 1803, known as the Louisiana Purchase. In Oklahoma the State owns the bed of navigable streams to the ordinary highwater mark. *City of Tulsa* v. *Commissioners of Land Office, et al.*, 101 P.2d 246 (Okla. 1940); *Lynch* v. *Clements*, 263 P.2d 153 (Okla. 1953). Oklahoma was admitted to the Union on an equal footing with the original States (34 Stat. L. 267-278). In *Pollard* v. *Hagan, et al.*, 3 How. 212, 11 L.Ed. 565 (1845), the Court cited *Martin*,

et al. v. *Waddell*, 16 Pet. 367, 10 L.Ed. 997, for the proposition that upon the Revolution the people of each State acquired absolute right to all their navigable waters and the soils under them for their common use; and the Court in *Pollard* held that the beds of navigable waters were not granted by the Constitution to the United States but were reserved by the original States and that new States have the same rights, sovereignty, and jurisdiction over this subject as the original States. In *Shively* v. *Bowlby*, 151 U.S. 1, 38 L.Ed. 331 (1893), this Court recognized the power of Congress to grant lands below navigable waters in a territory only when it is necessary "to perform international obligations or to effect the improvement of such lands for the promotion and convenience of commerce * * * or to carry out other public purposes appropriate to the objects for which the United States hold the Territory." The Supreme Court of Oklahoma in *Vickery* v. *Yahola Sand and Gravel Co.*, 12 P.2d 881 (1932), a case based on assertion of title to the Arkansas river bed by a Cherokee allottee holding a riparian allotment, considered both the pertinent Cherokee treaties, and *Shively* v. *Bowlby*, and held the river bed was owned by the State. The decision in *United States* v. *Holt State Bank*, 270 U.S. 49, 70 L.Ed. 465 (1925), under a fact situation similar to our case, recognizes the rule cited in *Shively* v. *Bowlby* and adds that the United States has refrained from making such dispositions of lands below navigable water during the territorial period except "in exceptional circumstances" and that disposals during the territorial period "are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." Not un-

der the standards set forth in *Holt State Bank*, nor under the general rule applicable to riparian lands along navigable waters, nor even under the general rules of ordinary conveyancing, was any grant of the river bed ever made by the United States to either the Cherokees or the Choctaws.

2. The treaties with the Choctaws culminating in the Treaty of Dancing Rabbit Creek in 1830 and the treaties with the Cherokees culminating in the Treaty of New Echota in 1835 and the respective patents thereafter issued to each of the tribes, provided only for the granting of a specified quantity of land located in a general area in the case of the Cherokees, and an unspecified quantity of land located within named boundaries in the case of the Choctaws. Fee simple title was not granted to either the Cherokees or the Choctaws. The grants to both tribes were conditional. In the Cherokee patent it is provided that "The lands hereby granted shall revert to the United States if the Cherokee Nation ceases and abandons the same." The Choctaw patent provides that it shall "inure to them as long as they shall exist as a nation and live on it." There is no language whatsoever in the treaties or patents with either of the tribes that expresses an intention to convey the title to the river bed. The Arkansas River is mentioned in these documents only as a boundary, a monument, or a reference point. All references to the river fall far short of evidencing a definite and specific intention to convey the bed of the river.

3. At the time of the treaties at issue in this case, there were specific and compelling reasons for retention by the United States of title to the navigable portion of the

Arkansas river bed, quite apart from and in addition to policies common to all navigable rivers. The acquisition of the Arkansas, a principal tributary of the Mississippi, and its retention as a national, public highway had been one of the principal expressed goals of the Louisiana Purchase, barely twenty-five years earlier. It was a critical avenue for trade, commerce, and communications not only to, but also through the treaty lands of these Indians to lands occupied by other resettled tribes and beyond, to territory from which many other States would later be carved. The bed of the Arkansas was then thought, too, to contain large deposits of valuable minerals, including salt, silver and gold. Finally, the Arkansas constituted the boundary between the Cherokee and Choctaw lands, a boundary upon which the United States was charged with both the maintenance of the peace and the regulation of commerce; and the river served as the principal lifeline of Fort Gibson, the United States' major military garrison in Indian territory. In the total absence of any demand by the Indians for the Arkansas River, it is inconceivable that the United States would have voluntarily divested itself of this critical national asset.

4. Counsel for the Cherokees and Choctaws argue that a conveyance of the river bed must be inferred from the fact that provisions were made in their respective treaties that the lands conveyed to them should not be included in the boundaries of a future Territory or State without their consent. This inference is not sufficient to effect a conveyance of the river bed under the rules we have stated above. But assuming, arguendo, that the provisions in the treaties concerning a future Territory or State may be relevant,

the significance of the provisions, their contemporaneous setting, and the events that followed must then be considered. The provisions were not inconsistent with the policies, powers and rights of the United States to form a State from an area which included the lands ceded to Petitioners. At the time of the treaties the Cherokees and Choctaws were in a state of pupilage and their relation to the United States was that of wards to their guardian. They were not foreign sovereign nations and were subject to the dominion of the United States. *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 8 L.Ed. 25. The United States intended eventually to include the area ceded to its wards in a future Territory or State. See House Report 736 dated June 27, 1848, attached as our Appendix 8 for an historical summary and discussion on this subject. See also Chapter 2 Mills' Indian Land Laws attached as our Appendix 10. Consent is required of the residents (whether Indian or White) of any area that is admitted as a State. The United States Constitution, Article IV, Sec. 3, Clause 1, provides that new States may be *admitted* into the Union by Congress. The Cherokees and Choctaws were aware of these policies, powers and rights when they made the treaties.

By the Act of March 3, 1893, 27 Stat. L. 645, Congress created a commission for the purpose of inducing the Cherokees and Choctaws and other tribes to relinquish tribal rights and to accept allotment of their lands in severalty to tribal members with the ultimate object of including said lands in a state. "Oklahoma Indian Land Titles" by W. F. Semple, Chap. II. The result of this act and ensuing acts of Congress were agreements with the Cherokees, 32 Stat. L. 716, and with the Choctaws, 30 Stat. L. 495 and

32 Stat. L. 641, which provided for allotment of the lands to individual members of the respective tribes and relinquishment of the general powers of the tribal governments. These agreements were followed by the Act of April 28, 1904, 33 Stat. L. 573, which supplanted the tribal laws; and the Act of April 26, 1906, 34 Stat. L. 137, continuing tribal governments for limited purposes pending termination at some future time, and for regulation of tribal affairs under the Interior Department. The Cherokees and Choctaws became citizens of the United States as a result of these Congressional Acts. As citizens of the Territory they voted with other citizens in the elections concerned with admission of Oklahoma to the Union—and Oklahoma was admitted on November 16, 1907.

PRELIMINARY STATEMENT

The question to be resolved is simple and direct. Did the United States convey or agree to convey the river bed to the Cherokees or the Choctaws? The answer is—No! Not by the standards this Court has established for the beds of navigable waters, nor even by the accepted standards of ordinary conveyancing. In the judgment of the courts below there was no ambiguity on this subject and each of them concluded that the treaties and patents did not provide for a conveyance of the bed of the river.

Petitioners, not having met the burden of showing inclusion of the river bed under their treaties or patents, have sought to shift the burden by arguing that the State must show that the United States *reserved* the river bed when it made the treaties and patents. *Since the United*

States did not convey the river bed there was no need to reserve it.

To avoid the stark criterion which we have stated above, Petitioners have presented a voluminous and irrelevant mass of data which should not becloud the only question that need concern this Court: Did the United States agree to convey or convey the river bed?

The premise upon which Petitioners build their argument is the fact that there are provisions in the treaties to the effect that the lands ceded to them would not, without their consent, be included within the limits of any Territory or State. From this premise they conclude erroneously that:

1. The United States forever renounced the possibility of forming a Territory or State that embraced their lands—even with their consent; and

2. The United States could not continue to hold the bed of the navigable river, after the treaties.

Each of these conclusions is a fallacy.

In Section I of our Argument we will demonstrate the basis of Oklahoma's title to the navigable river bed.

In Section II we will demonstrate that in the treaties and patents and attendant circumstances there is no evidence of an intention to convey the bed of the navigable river to either of Petitioners.

In Section III we will demonstrate that at the time of the treaties there were specific and compelling reasons for retention by the United States of title to the navigable portion of the Arkansas River bed, apart from policies common to all navigable waters.

In Section IV we will demonstrate that the provisions in the treaties that the lands ceded to each of Petitioners would not, without their consent, be included within the limits of any Territory or State, were not inconsistent with the policies, powers and rights of the United States to form a State from an area which included the lands ceded to Petitioners.

I

THE STATE OF OKLAHOMA ACQUIRED TITLE TO THE BED OF THE NAVIGABLE PORTIONS OF THE ARKANSAS RIVER WHEN IT BECAME A STATE.

The title of the State of Oklahoma basically rests upon the legally navigable character of the river bed of the Arkansas River in Oklahoma below the confluence of that river with the Grand River. Though the legal navigability of this river over this area is not questioned by Petitioners, we believe it helpful to quote the conclusion of the Trial Court on this subject:

> "It is the conclusion of the court as to this issue, arrived at from documents, records, reports, and articles made and filed or published contemporaneously with the pertinent times, and from published books and research material written by students of the area and the period, all of which are as readily available to the court as to the parties, that it was common knowledge in the legal sense that from at least as early as 1824 until sometime after November 16, 1907, the Arkansas River in its natural state was a navigable river below its confluence with the Grand River, regularly used throughout the remainder of its course in what is now Oklahoma as a highway of commerce during the major portion of each year. Accordingly, it is the decision of this court, based upon judicial knowledge

alone and without taking evidence, that this stretch of the Arkansas River was navigable in fact and in law at the time the western domains, now a part of Oklahoma, were ceded to the Choctaw Nation and to the Cherokee Nation, and at the time the treaties were made pursuant to which the lands were ceded, and also at the time Oklahoma was admitted to statehood on November 16, 1907." (Pre-Trial Order filed September 25, 1967) (Joint Appendix 113a).

This Court judicially knows Oklahoma is a part of the territory acquired by the United States from France in what was known as "The Louisiana Purchase." This was effected by the Treaty of April 30, 1803. Particularly pertinent articles of this treaty are as follows:

"ARTICLE I. Whereas, by the article the third of the treaty concluded at St. Ildelfonso, the 9th Vendemiaire, an. 9 (1st October, 1800) between the First Consul of the French Republic and his Catholic Majesty, it was agreed as follows:

'His Catholic Majesty promises and engages on his part, to cede to the French Republic, six months after the full and entire execution of the conditions and stipulations herein relative to his royal highness the duke of Parma, the colony or province of Louisiana, with the same extent that it now has in the hands of Spain, and that it had when France possessed it; and such as it should be after the treaties subsequently entered into between Spain and other states.'

And whereas, in pursuance of the treaty, and particularly of the third article, the French Republic has an incontestible title to the domain and to the possession of said territory: The first Consul of the French Republic desiring to give to the United States a strong

proof of his friendship, doth hereby cede to the said United States, in the name of the French Republic, forever and in full sovereignty, the said territory with all its rights and appurtenances, as fully and in the same manner as they have been acquired by the French Republic, in virtue of the above-mentioned treaty, concluded with his Catholic Majesty:

* * * * * * *

"ARTICLE III. *The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States;* and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess." (Emphasis ours.)

This Treaty and the two complementary Conventions of the same date are found in 8 Stat. L., pages 200 to 212, inclusive.

On August 12, 1803, President Thomas Jefferson wrote a letter to John Breckenridge concerning the Louisiana Purchase Treaty. Mr. Breckenridge was a Senator from Kentucky and was well-known nationally as a spokesman for the West. Later, he became Attorney General under Jefferson. In this letter President Jefferson discussed the future use to be made of the land acquired under the treaty and expressed his ideas as to the formation of future states west of the Mississippi. He said:

"* * * The inhabited part of Louisiana, from Point Coupee to the sea, will of course be immediately a territorial government, and soon a State. But above that, the best use we can make of the country for some time, will be to give establishments in it to the Indians

> on the east side of the Mississippi, in exchange for their present country, and open land offices in the last, and thus make this acquisition the means of filling up the eastern side, instead of drawing off its population. When we shall be full on this side, *we may lay off a range of States on the western bank from the head to the mouth, and so, range after range, advancing compactly as we multiply.*" (Emphasis ours.) (State Papers and Correspondence bearing upon the Purchase of the Territory of Louisiana. Washington Government Printing Office, 1903, page 235.) (A complete copy of this letter as it appears on pages 233 to 235 of this publication is included in our Appendix 10.)

Thus, we see that while President Jefferson did think that the Indians could be moved west of the Mississippi, he did not consider this to be a bar to the formation of future states in the same area which he suggested could be established "range after range, advancing compactly as we multiply."

President Jefferson, on the day he submitted the Treaty of April 30, 1803, to the Senate for ratification (on October 17, 1803), in his third annual message to Congress, had this comment to make concerning this new acquisition:

> "Whilst the property and sovereignty of the Mississippi and its waters secure an independent outlet for the produce of the Western States and an uncontrolled navigation through their whole course, free from collision with other powers and the dangers to our peace from that source, the fertility of the country, its climate and extent, promise in due season important aids to our Treasury, an ample provision for our posterity, and a wide spread for the blessings of freedom and equal laws." (Messages and Papers of the Presidents, Vol. 1, at page 346).

Claude G. Bowers, in his book "Jefferson in Power" discusses the debates in Congress concerning approval of the treaty by the Senate and appropriation of the purchase price by the House. He states that the New England Federalists bitterly opposed the treaty and the expenditure, and in discussing the grounds for their opposition he said (on page 213):

> "Many complained bitterly of paying fifteen million dollars for the territory from which were to be carved Louisiana, Arkansas, Missouri, Oklahoma, Kansas, Nebraska, the two Dakotas, the greater part of Idaho and Montana, and parts of Texas, New Mexico, Colorado, and Wyoming. An outrageous price! Rufus King, in his loftiest mood, was sure that with his diplomacy it could have been had for much less. They all agreed it was unconstitutional. But deep down, the resentment of the extreme New England Federalists was that, with the States ultimately to be carved from the new territory, the dominance of their section would be lost."

The series of Congressional Acts which followed the Louisiana Purchase and related to the establishment of the territories of Orleans and Louisiana show the determination of Congress that all navigable waters in the territories (which include what is now Oklahoma)[1] were to be held in

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[1]After considerable debate, Congress finally voted the funds requested by Jefferson for the Louisiana Purchase. Thereafter, Congress enacted the Act of March 26, 1804, 2 Stat. L. 283, which divided the Louisiana Purchase into two territories and provided for the temporary government thereof. The Preamble of this Act is set forth below:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all that portion of country ceded by France to the United States, under the name of Louisiana, which lies south of the Mississippi territory, and of an east and west line to commence on the Mississippi river, at the thirty-

trust for the citizens of the future States. Section 12 of the Act of February 15, 1811, 2 Stat. L. 617, an Act providing for the final adjustment of claims to lands and for the sale of public lands in territories of Orleans and Louisiana provides:

> ". . . and be it further enacted that *all the navigable rivers and waters in the Territories of Orleans and Louisiana shall be, and forever remain public highways.*" (Emphasis ours.)

Section 3 of the Act of February 20, 1811, 2 Stat. L. 641, an Act to enable the people of the Territory of Orleans to form a constitution and state government and for the admission of such state into the Union *on an equal footing with the original states,* and for other purposes, provides in part:

> "and that the *river Mississippi and the navigable rivers and waters leading into the same or into the gulf of Mexico, shall be common highways* and forever free, as well to the inhabitants of the said state as to other citizens of the United States, without any tax, duty, impost or toll therefor, imposed by said state." (Emphasis ours.)

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[1] (Continued)

third degree of north latitude, and to extend west to the western boundary of the said cession, shall constitute a territory of the United States, under the name of the territory of Orleans; the government whereof shall be organized and administered as follows:

* * * * * * * *

"Section 12. The residue of the province of Louisiana, ceded to the United States, shall be called the district of Louisiana, the government whereof shall be organized and administered as follows:"

The next year Congress enacted the Act of March 3, 1805, 2 Stat. L. 331, which changed the district of Louisiana to the territory of Louisiana, which territory included all of the lands in the Louisiana Purchase except the territory of Orleans which was to become the State of Louisiana.

Section 12 of the Act of March 3, 1811, 2 Stat. L. 662, also provides:

> "That all the navigable rivers and waters in the territories of Orleans and Louisiana shall be and forever remain public highways."

The Act of Congress of June 16, 1906, known as "The Enabling Act" provided for admission of Oklahoma Territory and Indian Territory to the Union as one State, 34 Stat. L., pages 267-278. This Act is found in Oklahoma Statutes Annotated in the volume on the Constitution, Articles 1 to 4 and covering the Organic Acts. In Section 4 of the Enabling Act at page 367 of the said O.S.A. volume we find the following:

> *"the proposed State of Oklahoma shall be deemed admitted by Congress into the Union, under and by virtue of this Act, on an equal footing with the original States."* (Emphasis ours.)

In Section 1 of Article 11 of the Constitution of Oklahoma, the State accepts all grants of land made by the United States under the provisions of the Enabling Act, and any other Acts of Congress, for the uses and purposes and upon the conditions, and under the limitations for which they are granted or donated. Oklahoma statutory assertions of title to river beds are as follows:

> "64 O.S.A. Section 290. LEASE OF LANDS ALONG CERTAIN STREAMS — STREAMS DECLARED PROPERTY OF STATE.
>
> "The Commissioners of the Land Office are hereby authorized to lease for oil and gas purposes all lands between mean high water mark in all streams or rivers of two chains or over; all such streams are declared the property of the State of Oklahoma." (Laws 1919, Ch. 206, p. 293, Sec. 1)

"60 O.S.A. Section 337. ISLANDS IN NAVIGABLE STREAMS.

"Islands and accumulations of land formed in the beds of streams which are navigable, belong to the State, if there is no title or prescription to the contrary." (Comp. Laws 1909, Sec. 7371).

There can be no doubt where the State of Oklahoma stands on the question involved in this case in view of the above quoted statutes and the decisions of the Oklahoma Supreme Court, and the administrative actions of the state government. In the case of *City of Tulsa* v. *Commissioners of Land Office, et al.*, 101 P.2d 246 (1940), the Oklahoma Supreme Court said:

> "In some jurisdictions the state owns the bed of navigable streams to the ordinary high water mark. In other states ownership in the state extends only to low water mark. 45 C.J. 540, 541. In Oklahoma ownership of the bed of navigable streams in the state extends to high water mark. *Nolegs* v. *Edmiston, supra*" (1914).

In the case of *Lynch* v. *Clements*, 263 P.2d 153 (1953), the Supreme Court of Oklahoma said:

> "[3]Near the land in the instant case was land involved in the case of *Vickery* v. *Yahola Sand & Gravel Co.*, 158 Okl. 120, 12 P.2d 881. The plaintiffs there admitted that the Arkansas River was navigable adjacent to the land involved. The question naturally arose as to what title, if any, the Cherokee allottee got in the river bed opposite the land in the *Vickery* case. There it was announced in the third, fourth, fifth and sixth syllabi:
>
> 'The treaties between the United States and the Cherokee Indian Tribe and the patent made pursuant

thereto, whereby certain lands on both banks of the Arkansas River in what is now the state of Oklahoma were granted to said Cherokee Indian Tribe, show no purpose to define riparian rights, and the intention to abide by state law is inferred.

'A state takes title to the bed of navigable streams in its borders, where the United States has not exercised its power so to do, by specific grant or necessary intendment, granted or conveyed its title thereto prior to the admission of the state into the Union.

'The United States did not, by specific grant, or otherwise, grant or convey to the Cherokee Indian Tribe the title to the bed of the Arkansas river, where in its course it was navigable in fact.

'A Cherokee allottee of land along the course of the Arkansas river at a place where the same is admitted to be navigable acquired no title to the bed of said river below high-water mark.' "

The State has asserted ownership of the mineral resources in the river bed over sixty years through extraction of untold tons of sand and gravel through its permittees and lessees and through the granting of oil and gas leases.

The Interior Department concurred in Oklahoma's assertion of title. In a letter dated March 26, 1908 (See *State v. Nolegs*, 139 Pac. 943 at 945), from Acting Commissioner of Indian Affairs, C. F. Larrabee, to the Secretary of the Interior, we find the following statement:

"In other words, when the United States conveyed by warranty deed the lands occupied by the Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles, it did not convey the ownership of the beds of navigable streams, but reserved them for the benefit of the future state within whose boundaries they would fall.

Thus the state of Oklahoma, on its creation, became absolute owner of the bed of the Arkansas river, and the Cherokee Nation is not entitled to royalty for any sand or gravel taken from the bed of that river since November 6, 1907.

"Very respectfully, (Signed) C. F. Larrabee, Acting Commissioner.

'March 27, 1908

'Approved: (Signed) Jesse E. Wilson, Secretary'" (A complete copy of this well considered opinion by Mr. Larrabee is included in our Appendix 2.)

The foregoing letter is of extreme importance here as direct evidence of long continued executive interpretation expressly placed upon the treaties involved in this litigation by the Department of the Interior, which is charged with their administration. Such long continued administrative construction has been held to have the effect of law. *Helvering* v. *Winmill*, 305 U.S. 79, 83 L.Ed. 52 (1938). It is always entitled to great weight by the courts faced with the task of construing the same treaties (statutes) and should not be overturned without cogent reasons. *Zemel* v. *Rusk*, 381 U.S. 1, 14 L.Ed.2d 179 (1965). See also the many authorities collected in 82 C.J.S. "Statutes," Sec. 359. This is especially true where such construction has been made by the highest officers in the executive department concerned, *Petition of Finance Committee of Legislature of Virgin Islands*, 242 F.2d 902 (C.A. Virgin Is. 1957), and here note that the foregoing letter was expressly approved by the Secretary of the Interior on March 27, 1908.

The presence of the oil and sand and gravel lessees of the State as defendants and Respondents in this case is a further evidence of the assertion by Oklahoma of its title

to the bed of the river between its confluence with the Grand and the Arkansas state line. Neither the United States nor the Cherokees nor the Choctaws have sought legal redress prior to the filing of this action in 1966. In the brief for the United States as *Amicus Curiae* we find an attempt to diminish the effect of this administrative interpretation letter that has stood unchallenged for sixty years by Petitioners and by the United States Department of Justice. Counsel say this interpretation should not be considered because of (1) an error of fact in that a patent was called a warranty deed, and (2) this interpretation was not made in an adversary proceeding, and (3) the letter featured no discussion of the treaties, and (4) the letter was not contemporaneous with the treaties and patents. We submit that each of these purported distinctions have no bearing on the legal effect of this administrative interpretation that was made by the Secretary of the Interior and stood unchallenged by Petitioners and *Amicus Curiae* for about sixty years.

At page 37 of the Cherokees' brief is a statement "Long before the admission of Oklahoma into the Union, the Cherokee Nation worked the river for sand and gravel and negotiated sand and gravel leases with many companies and received royalties for such minerals." In support of this statement their Appendix I is submitted. All leases listed on Appendix I are shown to be dated between 1884 and 1893 and *an examination of the records cited shows that not a single one applies to the bed of the navigable portion of the Arkansas River.*

The title of the people of the State in which the land is located to the bottoms of the navigable waters was de-

cided at an early date by the United States Supreme Court in the case of *Martin* v. *The Lessee of Waddell*, 16 Pet. 367, 10 L.Ed. 997 (1842). This case was instituted in the trial court in 1835 and decided by the United States Supreme Court in 1842. The case involved a contest for certain navigable water bottoms in New Jersey. One party claimed under a title originating in a grant from the King of England, and the other party claimed under a law of the State of New Jersey passed in 1824 and a supplement thereto. In holding for the party claiming under the State the Court related the State's title back to the time of the Revolution and it said:

> ". . . For when the Revolution took place the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government . . ."

Oklahoma was admitted to the Union "on an equal footing with the original states." Upon acquisition of the land covered by the Louisiana Purchase, the United States then held it in trust as to the navigable river beds for the states thereafter to be created from the lands thus acquired. The United States continued to hold the land under the navigable portions of the Arkansas River in trust for Oklahoma until it was created. Promptly upon achieving statehood, Oklahoma became vested with the title of the river bed of the Arkansas River under its navigable portions located below high-water mark.

A leading authority on this proposition is the case of *Pollard, et al.*, v. *Hagan, et al.*, 3 How. 212, 11 L.Ed. 565

(1845). That was a case where a claimant under a Spanish grant of land under navigable waters in Alabama sought to establish title against one claiming under the state, relying upon a confirmation of the invalid Spanish grant by the United States through a United States Statute enacted after Alabama became a State and a patent from the United States. This confirmation of title by Federal statute and patent was held to be ineffective against one claiming under the sovereign title of the State of Alabama. The Court in its opinion said:

> "Alabama is therefore entitled to the sovereignty and jurisdiction over all the territoy within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine, is to deny that Alabama has been admitted into the Union on an equal footing with the original States, the constitution, laws, and compact, to the contrary notwithstanding. But her rights of sovereignty and jurisdiction are not governed by the common law of England as it prevailed in the colonies before the Revolution, but as modified by our own institutions. In the case of *Martin, et al.* v. *Waddell* (16 Peters, 410), the present Chief Justice, in delivering the opinion of the court, said: 'When the Revolution took place, the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution.' Then to Alabama belong the navigable waters, and soils under them, in controversy in this case, subject to the rights surrendered by the Constitution to the United States; and no compact that might be made between her and the United States could diminish or enlarge these rights.

". . . we have arrived at these general conclusions: First, the shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the States respectively. Second, The new States have the same rights, sovereignty, and jurisdiction over this subject as the original States. Third, The right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy in this case."

The United States Supreme Court in the case of *Goodtitle* v. *Kibbe*, 9 How. 471, 13 L.Ed. 220 (1850), affirmed the general conclusion the Court had previously reached in *Pollard*, but qualified the rule by saying that undoubtedly, Congress might have granted the land which was under the navigable water at the time of Statehood to the grantee under the Spanish grant and patentee under the Act of Congress before Alabama became a State, but that Congress did not do so. The reasons why Congress did not do so are fully discussed in authorities which will be presented hereinafter.

The case of *Weber* v. *State Harbor Commissioners*, 18 Wall. 57, 21 L.Ed. 798 (1873), involved the jurisdiction of the City of San Francisco, which it had derived from the State of California, over the navigable water bottoms in San Francisco Bay. The Court in discussing the fundamental proposition stated:

"Although the title to the soil under the tide-waters of the bay was acquired by the United States by cession from Mexico, equally with the title to the upland, they held it only in trust for the future state. Upon the

admission of California into the Union upon equal footing with the original states, absolute property in and dominion and sovereignty over all soils under the tidewaters within her limits passed to the state, with the consequent right to dispose of the title to any part of said soil in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several states the regulation of which was vested in the general government. *Pollard* v. *Hagan*, 3 How. 212; *Mumford* v. *Wardwell*, 6 Wall. 436, 18 L.ed. 761."

The case of *Shively* v. *Bowlby*, 152 U.S. 1, 38 L.Ed. 331 (1893) involved the title in certain lands below the high water mark in the Columbia River in the State of Oregon, one party claiming under the United States and the opposing party claiming under the State of Oregon. Mr. Justice Gray, observing that the briefs submitted disclosed such a diversity of view as to the scope and effect of previous decisions of the Supreme Court upon the subject of public and private rights in lands below high water mark of navigable waters, stated that this was a fit occasion for a full review of those decisions, and a consideration of other authorities upon the subject. His opinion is a most thorough and exhaustive analysis of the previous decisions and of the law as developed in those decisions and as it appeared to the Court in this case. The Court then expressed the law with which we are concerned in apt and accurate language as follows:

"By the Constitution, as is now well settled, the United States, having rightfully acquired the territories, and being the only government which can im-

pose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and state, over all the territories, so long as they remain in a territorial condition. *American Ins. Co.* v. *356 Bales of Cotton*, 26 U. S. 1 Pet 511, 542 (7:242,255); *Benner* v. *Porter*, 50 U.S. 9 How 235, 242 (13:119, 122); *Cross* v. *Harrison*, 57 U.S. 16 How. 164, 193 (14:889, 901); *First Nat. Bank of Brunswick* v. *Yankton County*, 101 U.S. 129, 133 (26:1046, 1047); *Murphy* v. *Ramsey*, 114 U.S. 15, 44 (29: 47, 57); *Mormon Church* v. *United States*, 136 U.S. 1, 42, 43 (34:478, 491); *McAllister* v. *United States*, 141 U.S. 174, 181 (35: 691, 695).

"*We cannot doubt, therefore, that Congress has the power to make grants of lands below high water mark of navigable waters in any territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects of which the United States hold the territory.*

"IX. *But Congress has never undertaken by general laws to dispose of such lands.* And the reasons are not far to seek.

"As has been seen, by the law of England, the title in fee, or *jus privatum*, of the King or his grantee was, in the phrase of Lord Hale, 'charged with and subject to that *jus publicum* which belongs to the King's subjects,' or as he elsewhere puts it, 'is clothed and superinduced with a *jus publicum*, wherein both natives and foreigners in peace with this kingdom are interested by reason of common commerce, trade and intercourse.' Hargrave's Law Tracts, 36, 34. In the words of Chief Justice Taney, 'the country' discovered and settled by Englishmen 'was held by the King in his public and

regal character as the representative of the nation, and in trust for them;' and *the title and the dominion of the tide waters and of the soil under them, in each colony, passed by the royal charter to the grantees as 'a trust for the common use of the new community about to be established;' and, upon the American Revolution, vested absolutely in the people of each state* 'for their own common use, subject only to the rights since surrendered by the Constitution to the general government.' *Martin* v. *Waddell*, 41 U. S. 16 Pet. 367, 409-411 (10:997, 1012, 1013). As observed by Mr. Justice Curtis, 'This soil is held by the state, not only subject to, but in some sense in trust for, the enjoyment of certain public rights.' *Smith* v. *Maryland*, 59 U.S. 18 How. 71, 74 (15:269, 270). The title to the shore and lands under tide water, said Mr. Justice Bradley, 'is regarded as incidental to the sovereignty of the state —a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation and fishery.' *Hardin* v. *Jordon*, 140 U. S. 371, 381 (35:428, 433). And *the territories* acquired by Congress, whether by deed of cession from the original states, or by treaty with a foreign country, *are held* with the object, as soon as their population and condition justify it, of being admitted into the Union as states, upon an equal footing with the original states in all respects: *and the title and dominion of the tide waters and the lands under them are held by the United States for the benefit of the whole people, and, as this court has often said, in cases above cited, 'in trust for the future states.'* *Pollard* v. *Hagan*, 44 U. S. 3 How. 212, 221, 222 (11:565, 570); *Weber* v. *State Harbor Comrs.*, 85 U. S. 18 Wall. 57, 65 (21:798, 801); *Knight* v. *United Land Asso.*, 142 U. S. 161, 183 (35:974, 981).

"The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the

coast, above high water mark, may be taken up by actual occupants, in order to encourage the settlement of the country; *but that the navigable waters and the soils under them,* whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation and fishery, and for the improvements necessary to secure and promote those purposes, *shall not be granted away during the period of territorial government; but unless in case of some international duty or public exigency, shall be held by the United States in trust for the future states, and shall vest in the several states, when organized and admitted into the Union,* with all the powers and prerogatives appertaining to the older states in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the state, after it shall have become a completely organized community." (Emphasis ours.)

Thus we see that Congress has the power to make grants of land below high water mark of navigable waters in any territory of the United States only under certain very limited circumstances which in this opinion are expressed as follows: (a) Whenever it becomes necessary to do so in order to perform international obligations; (b) To effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states; (c) to carry out the public purposes appropriate to the objects for which the United States holds the territory. Certainly no one of the purposes would be effected by transfer by Congress to the Indian Tribes or to

Indian allottees or to any individuals of the bed of the navigable portion of the Arkansas River below high water mark.

The Oklahoma Supreme Court has addressed itself expressly to the question whether the Cherokees come under any one of the exceptions to the general policy of the United States set out in the opinion of *Shively* v. *Bowlby*. In the case of *Vickery* v. *Yahola Sand & Gravel Co.*, 12 P.2d 881 (1932), Vickery, a Cherokee, held a Cherokee allotment abutting upon the Arkansas River a short distance below its confluence with the Grand River. He sued Yahola Sand & Gravel Co. to recover for sand and gravel it had removed from the river bed opposite Vickery's allotment. The trial court found for the defendant and on appeal to the Oklahoma Supreme Court the State intervened and filed a brief. The court considered the pertinent treaties with the Cherokees, and furthermore considered whether it had been necessary for the United States to convey the bed of this navigable stream to the Cherokees in order "to carry out other public purposes appropriate to the objects of which the United States hold the territory." *This is precisely the proposition argued by the Cherokees and the principle argued by the Choctaws.* In holding in favor of the defendant and the state and against Vickery, the Cherokee allottee, the court's opinion applied against the tribal claims as well as against the allottee when it said:

> "The question then arises: Has Congress exercised the power by the grant of the lands involved to the Cherokee Indian Tribe by the treaty with the Western Cherokees of May 6, 1828 (7 Stat. 311), as supplemented and modified by the Treaty of February 14, 1833 (7 Stat. 414), reaffirmed and ratified in the Treaty with

the Cherokees at New Echota, Ga., December 29, 1835 (7 Stat. 478), whereby the lands on both sides of the Arkansas river from above the mouth of the Neosho or Grand river to the confluence of the Arkansas and Canadian rivers was granted to the Cherokees?

"The lands here involved were included within the above grant, and as stated above it is conceded that the Arkansas river where it flows along said land is and was at that time navigable.

"The treaties made no specific mention of rivers, navigable or non navigable, within the boundaries of the grant.

* * * * * * *

"Nothing in the treaties will be found showing that it was necessary to convey the title to the bed of the Arkansas river, where it was in fact navigable, to the Cherokee Tribe in order to perform an international obligation. Neither is such necessity shown in order to effect the improvement of such lands (within the bed of the river) for the promotion and convenience of commerce with foreign nations and among the several states.

"Considering the several Cherokee treaties, acts of Congress, and conveyances in the light of the times and circumstances in which they were made, and giving full force to the rule of interpretation set forth in the opinions of the Circuit Court of Appeals in the *Brewer-Elliott* Case, *supra, nothing appears that would make it necessary to convey the bed of the navigable stream to the Cherokee Tribe in order to carry out any public purposes appropriate to the objects for which the United States held the territory embracing the lands granted.* The territory embracing the lands was a part of the Louisiana Purchase. The declared purpose of the Louisiana Purchase Treaty with France was that statehood should be ultimately conferred upon

the inhabitants of the territory purchased, though this purpose was in a measure departed from in the treaties, in that by article 5, of the Treaty of New Echota (7 Stat. 481), it was provided: 'Article 5. The United States hereby covenant and agree that the lands ceded to the Cherokee nation in the foregoing article shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory.' But ultimately the purpose, as originally declared, has been accomplished.

"The only other purpose appropriate to the objects for which the United States held the land that has been suggested was to provide a permanent home for the several Indian Tribes.

"[5, 6] We see nothing in the treaties or acts of Congress, considering the times and circumstances in which they were made, and the relation between the contracting parties, that would render it necessary to convey the title to the bed of navigable rivers within the lands granted to the Cherokees in order to carry out the purpose of providing a permanent home for the tribe.

"On the other hand, it would appear to the best interests of the tribe in full enjoyment and possession of the home thus provided that the navigable rivers within the lands should be and remain public highways. The Cherokee Indians were not then extensively engaged in commerce but rather an agricultural people. Aside from marketing their agricultural products, their trade and commerce consisted largely of barter and trade between themselves and with certain designated and licensed traders permitted to trade within their country. It was highly necessary at that time, for the benefit of the Cherokees as well as other Indian tribes located on adjacent lands that the navigation of the Arkansas river, as far up its course as the same was navigable, be kept open and free, and for this purpose it would

appear far better that the title to the bed of the stream, where navigable, be kept and held in the United States, for the ultimate use and benefit of the future state, if and when, by the consent of the Cherokee Tribe, a state should be erected embracing the lands so granted to them.

"This would be in accord with the general policy of the United States and the theory upon which the Congress of the United States has constantly acted in disposing of the public lands, stated in *Shively* v. *Bowlby, supra,* as follows: 'The congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, above high-water mark, may be taken up by actual occupants, in order to encourage the settlement of the country, but that the navigable waters and the soils under them, whether within or above the ebb and the flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation, and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government; but, unless, in case of some international duty or public exigency, shall be held by the United States in trust for the future states, and shall vest in the several states, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older states in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the state, after it shall have become a completely organized community.

"*We are, therefore, of the opinion that neither by express terms nor by intention of the contracting part-*

ies did the title to the bed of the Arkansas river, where the same was navigable in fact, pass from the United States to the Cherokee Nation within the bounds of the tracts of land granted by the United States to said tribe under and by virtue of the treaties mentioned, but that it was retained and held by the United States in trust for the then future state, and that upon admission of the state of Oklahoma to the Union in 1907, the title thereto vested in and became the property of the state of Oklahoma. The Cherokee Tribe having acquired no interest in or title to the bed of the Arkansas river below high-water mark where it flows along the land involved, it follows that plaintiff in error acquired no right, title, or interest in or to the lands within the bed of the river below high-water mark.

"The judgment is affirmed." (Emphasis ours.)

The United States Supreme Court has spoken on this subject.[2]

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[2]The suit of *Oklahoma* v. *Texas*, 258 U.S. 574, 66 L.Ed. 771 (1922), was brought to determine the true boundary between the States of Oklahoma and Texas, and to determine the ownership of the bed of the Red River between these two States, particularly in the so-called Big Pasture Area (approximately 43 miles of the River beginning at the 100th parallel and running east). The United States, by the court's leave, intervened as a party in interest on behalf of Indian allottees and in its proprietary capacity. The court held that its decision in the *United States* v. *Texas*, 162 U.S. 1, 40 L.Ed. 867 (1895), was res judicata, final, and conclusive upon the parties as to said boundary, to-wit: That under the Treaty of 1819 between the United States and Spain, the boundary was fixed as the south bank of the Red River and the United States acquired full title to the bed of river pursuant to this Treaty. The court further found that the Red River is not navigable anywhere along its course within the State of Oklahoma.

Although ownership of the bed of the Red River, not the Arkansas River, was in issue in this case, the Court did make the following important statement (at page 583) which bears on the case at hand:

"Oklahoma claims complete ownership of the entire bed of the river within that state, and, in support of its claim, contends that the river, throughout its course in the state, is navigable, and, therefore,

This Court, in the case of *United States of America* v. *Holt State Bank*, 270 U.S. 49, 70 L.Ed. 465 (1925), dealt with a situation where the United States had by treaties granted an area, which encompassed entirely within its outer boundaries a navigable lake, to the Chippewa Indians. This Court held that the bed of the navigable lake was not covered by the grant to the Indians, because the intent to include the bed of the lake was not definitely declared or otherwise made very plain in the applicable treaties. This case is in point.

We find in the briefs filed in behalf of Petitioners and *Amici Curiae* herein persistent misunderstandings of the

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[2] (Continued)

that, on the admission of the state into the Union, on November 16, 1907 [34 Stat. L. 2160], the title to the river bed passed from the United States to the state, in virtue of the constitutional rule of equality among the states, whereby each new state becomes, as was each of the original states, the owner of the soil underlying the navigable waters within its borders. *If that section of the river be navigable, its bed undoubtedly became the property of the state under that rule.*" (Emphasis ours.)

By the Treaty of June 22, 1855 (11 Stat. L. 611), the boundaries of the Choctaw-Chickasaw country were fixed as follows:

"Beginning at a point on the Arkansas River, one hundred paces east of old Fort Smith, where the western boundary line of the state of Arkansas crosses the said river, and running thence due south to Red River, thence up Red River to the point where the meridian of one hundred degrees West longitude crosses the same; thence north along said meridian to the main Canadian River; thence down said river to its junction with the Arkansas River, thence down said river to the place of beginning."

Inasmuch as the same kind of language was used with respect to the Arkansas River (* * * down said river * * *), as was used with respect to the Red River (* * * up Red River * * *), the above-quoted statement must be considered as also applicable to the ownership of the bed of the Arkansas River as well. No basis for any distinction exists—the section of the Arkansas River under consideration in the case at hand being navigable, its bed undoubtedly became the property of the State of Oklahoma upon its admission to the Union.

facts and misconstructions of the holding of this Court in *Holt State Bank*. We here state our understanding of the facts and the holding of this Court in *Holt State Bank* as it applies to this case.

Before Minnesota became a state in 1858, the Chippewas had been the aboriginal inhabitants of a large part of northern Minnesota, and in particular a part that encompassed a lake known as Mud Lake. By a series of treaties with the United States made before Minnesota statehood it was agreed that the Chippewas relinquish their aboriginal right of occupancy to the general area (not their title; for title was then in the United States by conquest from England), and that in exchange, title to certain areas known as "reservations" was vested in the Chippewas. Two of those treaties were cited in the opinion of the Court in *Holt State Bank* (Treaty of September 30, 1854, 10 Stat. L. 1109 and Treaty of February 22, 1855, 10 Stat. L. 1165). Both treaties contain provisions for the eventual allotment of lands in the reservations to tribal members. One reservation was known as the Red Lake Indian Reservation. Mud Lake was within that reservation. In 1889, pursuant to an act of Congress, provision was made that the Chippewas should cede back to the United States most of the Red Lake Indian Reservation including the part in the vicinity of Mud Lake; that the United States should then divide the land thus ceded and classify it as pine lands and agricultural lands; that the United States should dispose of the lands for cash considerations; and that the sums realized should be put in an interest-bearing trust fund for the Chippewas and ultimately disbursed for their benefit or distributed among them. *If the Chippewas had acquired no*

title to the Red Lake Reservation by the treaties prior to Minnesota statehood (as argued by counsel for Petitioners) why was provision made therein for allotment to tribal members and why was provision made in the 1889 Act to have the Chippewas cede the lands to be sold back to the United States? The United States did recognize the title of the Chippewas to the Red Lake Reservation and did not undertake to sell the lands located therein until they were ceded by the Chippewas back to the United States so that the United States could sell and convey them. Among the tracts disposed of as agricultural lands under this 1889 Act were certain tracts bordering on Mud Lake. These tracts were sold to certain settlers, who thus became riparian owners, and patents were issued to them. Later, when Mud Lake was drained, large areas of land were laid bare which were adjacent to the tracts on the shore of Mud Lake which had been sold to settlers. The riparian owners along the lake front contended that the lake was navigable when Minnesota became a state and that under the laws of Minnesota they were entitled to the land laid bare by the drainage and adjacent to their tracts. On the other hand, the United States insisted in behalf of the Chippewas that the lake was never more than a mere marsh and was not navigable and therefore the United States was entitled and was duty bound to dispose of the land under the Act of 1889 for the benefit of the Chippewas. The Court held that Mud Lake was a navigable body of water, and that under the treaties with the Chippewas prior to Minnesota statehood, there was no definite declaration that the United States intended to convey the bed of the navigable water bodies to the Chippewas or to recognize the bed of the navigable water bodies as belonging to the Chippewas even

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Bowlby, 152 U.S. 1, 47, 48, 57,
349, 352. 14 Sup.Ct.Rep. 548; *Sc*
229, 242. 57 L.ed. 490, 496. 44
Sup.Ct.Rep. 242; *Seattle* v. *Ore*
U.S. 56, 63, 65 L.ed. 500, 506
Brewer-Elliott Oil & Gas Co. v.
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States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future states, and so *has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposals by some international duty or public exigency.* It follows from this that *disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.*" (Emphasis ours.)

Among the authorities cited in the *Holt State Bank* case is the case of *Shively* v. *Bowlby*, 152 U.S. 1, 38 L.Ed. 331 (1893). As stated in *Shively* v. *Bowlby*, no grants of land have been made by Congress of lands under navigable waters in any territory of the United States unless it became necessary to do so for one of the following purposes: (1) to perform international obligations, or (2) to promote commerce with foreign nations and among the several states, or (3) to carry out the public purposes appropriate to the objects for which the United States holds the territory—and the Court in *Holt State Bank* adds (4) *that if the United States intends to dispose of lands in a territory under navigable water for any of the three foregoing reasons such intent must be "definitely declared or otherwise made very plain."*

The decision in *Holt State Bank* is in harmony with rules of law established covering public grants of riparian lands bounded by navigable waters. The general rule with respect to grants such as were involved in the *Holt State Bank* case is stated in 65 C.J.S. at 359 under Section 120 of the Title "Navigable Waters" and is as follows:

"A public grant of riparian land bounded by navigable water is generally construed strictly against the grantee in determining whether title to land under water passes to the grantee, and usually title to land under water is not transferred by such a grant."

In an attempt to show authorities affecting Indians that are contrary or different from the cases we have cited above, counsel for Petitioners and counsel for *Amici Curiae* have called attention to certain cases which we may for the purpose of comment characterize as the "fishing Indian cases" and as the "specific boundary cases." Where *Holt State Bank* was considered in any of those cases, the court did not find any conflict with the rule in *Holt*, but found there were substantial distinctions in the facts. Even in the cases that did not cite *Holt*, similar factual distinctions existed. One case cited is *Moore* v. *United States*, 157 F.2d 760 (9th Cir. 1946). Here the issue was confined to the right of control of fishing by the Director of Fisheries and the Director of Game of the State of Washington in a small area at the mouth of the Quillayute River, which was included in the Quillayute Indian Reservation. The evidence showed that the Quillayutes were granted this small area at the mouth of the Quillayute River so that they might sustain themselves by fishing on the adjacent waters, and it further showed that these Indians made their living by fishing, whaling and taking fur seals, and that accordingly, the use of the fishing grounds adjacent to their small reservation was absolutely essential to their livelihood. The Court distinguished *Holt State Bank* and found that there was no conflict with the fact situation in the *Moore* case and it said:

> "In the *Holt State Bank* case there is no evidence of the use of the navigable waters with reference to established industries of the Indians, as in the Annette Island and instant case, which, were operated in part on a portion of the river inside the lands reserved, with the uselessness of the sandspit save to enclose the river and to facilitate fishing therein."

The *Annette Island* case referred to in the *Moore* case is *Alaska Pacific Fisheries* v. *U. S.*, 248 U.S. 78, 63 L.Ed. 138 (1918). This was a suit by the United States to enjoin Alaska Pacific Fisheries from maintaining and operating a fish trap erected by it in navigable waters at the Annette Islands in Alaska. In 1891 Congress had passed a statute providing (among other things) that "the body of lands known as Annette islands * * * is hereby set apart as a reservation for the use of the Metlakahtla Indians." In affirming the decision of the two lower courts which enjoined Alaska Pacific Fisheries the Court said:

> "The circumstances which we have recited shed much light on what Congress intended by the 'the body of lands known as Annette islands.' The Indians could not sustain themselves from the use of the upland alone. The use of the adjacent fishing grounds was equally essential. Without this the colony could not prosper in that location."

In *Donnelly* v. *U. S.*, 228 U.S. 243, 57 L.Ed. 821 (1913), a murder prosecution was involved under which, for jurisdiction purposes, the ownership of the river bed of the Klamath River was involved. The river bed lay in an extension of Hoopa Valley Reservation to include a tract of country one mile in width on each side of the Klamath River and extending from said reservation to the Pacific Ocean. The

Court declared, in holding the river bed to be included in the Indian Reservation, "It would be absurd to treat the order as intended to include the uplands to the width of one mile on each side of the river and at the same time to exclude the river." The Court also cited the history of the Indians in making their principal living from fishing these waters.

Each of the "specific boundary cases" is distinguishable from our case, for in each the boundary in dispute was clearly and specifically described and thus no one case is similar to our case. Those cases are *Montana Power Co.* v. *Rochester*, 127 F.2d 189 (C.C.A. 9th Cir. 1942); *U. S.* v. *Romaine*, 255 Fed. 253 (C.C.A. 9th 1919); *U. S.* v. *Stotts*, 49 F.2d 619 (D.C. W.D. Washington 1930).

Thus it is seen that the decisions in *Holt State Bank* and other cases cited by us above are untouched and unaffected by the decisions cited by counsel for Petitioners and for *Amici Curiae*.

Under the facts of this case, the State of Oklahoma acquired title to the bed of the navigable portions of the Arkansas River when it was admitted as a State on an equal footing basis. No conveyance by the United States of the navigable portion of the Arkansas River bed had been made previous to Oklahoma statehood.

II

THE TREATIES AND THE PATENTS DO NOT PROVIDE FOR THE CONVEYANCE OF THE ARKANSAS RIVER BED TO EITHER THE CHEROKEES OR THE CHOCTAWS.

In construing the language of the treaties and the patents let us keep in mind that rule established in *Holt State Bank* "that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." That rule is an expression of the policy of the United States with respect to territorial lands under navigable waters, ably discussed and thoroughly analyzed in *Shively* v. *Bowlby* and other decisions presented herein.

This section of our Argument will be presented in three parts which will be as follows:

A. *No public purpose would have been served by the granting of the bed of the navigable portion of the Arkansas River to either of Petitioners.*

B. *The treaties and patents and contemporaneous circumstances show that the United States did not intend to cede the river bed to either of Petitioners.*

C. *The intention expressed in the treaties and patents was to provide for conveyance to each of Petitioners of a general area or a specified quantity of land, and each reference to the Arkansas River was solely as a boundary, a monument or a reference point.*

A. NO PUBLIC PURPOSE WOULD HAVE BEEN SERVED BY THE GRANTING OF THE BED OF THE NAVIGABLE PORTION OF THE ARKANSAS RIVER TO EITHER OF PETITIONERS.

Counsel for Petitioners and for *Amici Curiae* having failed to show a specific commitment to convey or conveyance by the United States of the river bed, apparently contend that such a purpose to convey could be inferred because they say it is necessary "to carry out the public purposes appropriate for the objects for which the United States holds the territory," one of the exceptions stated in *Shively* v. *Bowlby* to the general rule that the navigable waters and the soils under them shall not be granted away during the period of territorial government.

The "public purpose" is absent when one considers the advanced state of civilization attained by these tribes. These were not grants of land to primitive peoples for fishing and hunting grounds. It should be clearly understood at the outset that the Cherokees, Choctaws and Chickasaws were not primitive aboriginal people who knew nothing of the ways and customs of the white people, the citizens of the United States with whom they were dealing. In fact, these tribes, along with the Creeks and the Seminoles, who formerly lived in Alabama and Florida, were aptly called the "Five Civilized Tribes" in order to be distinguished from the wild and savage Plains Indians.

It should also be borne in mind that there were frequently great divisions and differences of opinion among the Indians, themselves, as to what course they should follow. Some advocated that they should completely isolate themselves from the white people and follow their own

customs and ways, and their own laws, and others urged that they should abandon the old ways and become citizens of the United States, arguing "if you can't whip them, join them." This is borne out by the fact that only a small number of the Cherokees made the first migration to Arkansas.

After the move westward this division of opinion continued. John Ross and Elias Boudinot were the leaders of rival factions, who disagreed bitterly as to what the policy of the Cherokees should be. Each had his followers and supporters, but many of the members of the tribe were undecided as to what they should do.

The argument that the Indians could benefit from citizenship in the United States was confirmed after the amalgamation was accomplished. To illustrate with only a few, Robert L. Owen, a Cherokee, was U. S. Senator for many years. William Hastings, a Cherokee, was elected to the Congress of the United States. Houston B. Teehee, another Cherokee, was appointed and served as Treasurer of the United States. Patrick J. Hurley, a Choctaw, served with distinction as Secretary of War. Many members of these tribes have served with dignity and distinction in the judiciary, as well as in the legislative and executive branches of our state and national governments.

The leaders of these Indian tribes who negotiated the treaties with the United States are not shown to be ignorant, uneducated savages. How many of them were partly descended from "white people" is not known, but every indication is that a substantial number of the leaders were partly "white." Many of these Indians worked long and hard in their advocacy of the cause of statehood.

When the Final Rolls of the Cherokee, the Choctaw and the Chickasaw Nations were prepared by the Dawes Commission, a record was made of (1) the name of the Indian, (2) his or her age, calculated to a date certain, (3) the sex of the Indian, (4) the quantum or percentage of the Indian blood of the enrollee, and (5) the number assigned to the census card, as a guard against duplicate enrollments. It is of interest to note that for the Cherokees there were 32,926 originally enrolled whose age was calculated to September 1, 1902, with 4,991 additional children, the "after-borns," enrolled, whose age was calculated to March 4, 1906. Of these approximately 38,000 Indians, only slightly more than 6,000 were full bloods. The part bloods ranged downward from 15/16ths to as low as 1/128th. Apparently if the quantum of blood was less than 1/128th they were not considered to be Indian. It is of interest to note the many fine old English, Scotch, French and Irish names of these Indians!

The same system was followed in enrolling the Choctaws and the Chickasaws. There were 16,227 Choctaws enrolled with ages calculated to September 25, 1902, on the so-called "Final Roll," with 1,583 "new borns," age calculated to March 4, 1905, and 956 minor Choctaw citizens by blood, age calculated to April 26, 1906, later added. Of these 18,766 Choctaw citizens only 6,645 were full bloods, with the quantum of blood of the enrolled citizens running as low as 1/128th.

Of the approximately 6,000 Chickasaws enrolled, including the "after-borns" with ultimate age calculated to March 4, 1906, only 1,432 were full bloods, with the percentage of Indian blood again being as low as 1/128th.

The Choctaws had 5,546 freed slaves enrolled as members of their tribe. Practically all of these slaves, who were not freed until the end of the Civil War, were Negroes who had been used by the Choctaws as laborers on their farms and plantations.

The Chickasaws had 4,853 freed slaves enrolled as members of their tribe. As with the Choctaws, most of these slaves were Negroes, and they also had been utilized in agriculture, for the main part.

The Cherokees had no "Freedmens Roll." Their former slaves were adopted into the tribe as members or permitted to leave, as they chose.

It seems hardly plausible that this dilution of Indian blood could have come about during the relatively short span of time intervening between the removal of the Indians to the Indian Territory, around 1830, and the preparation of the Final Rolls in 1906. At least eight generations are required to reduce from a full blood to a 1/128th blood.

When these farmers moved westward it would have been most unusual if they had abandoned their former ways of life and reverted to a nomadic status, living off the land and what wild game they could find. In fact, they did not. They settled down on farms, built homes, schools and churches, as the Cherokees point out.

There was no exceptional circumstance or international duty or public exigency existing which would impel the United States to divest itself of this public highway. Even as was the case with the Red River, which constituted the southern boundary of the Louisiana Purchase and the boundary with Texas, the United States wanted this

highway to remain open for all persons, whether they were Cherokees or Choctaws or not. Some thirty-odd other Indian tribes were being settled in this Territory, and it was essential that the benefits of the highway remain available for all who needed them. It would be absurd to say that the United States wanted to give it to the Cherokees or Choctaws and to deprive the numerous other tribes of the benefits arising therefrom.

There is nothing to indicate that the lack of ownership of the bed of this river would in any way adversely affect the rights or lives of these Indian tribes. Ownership remained in the United States. The Indians were given the use of the waters along with all others who might need to use them. Their use was not dependent upon ownership, but was the result of a permit, or license, from the United States.

The Oklahoma Supreme Court efficiently disposed of that "public purpose" contention over thirty-five years ago, in the case of *Vickery* v. *Yahola Sand and Gravel Co.*, in the language quoted in Section I above. Suffice it to say that even though neither the Cherokee Nation nor the State was named as a party to the action, both knew of the pendency of the action and were aware that Vickery was asserting ownership adverse to the Cherokees and the State. The State intervened in the action on the side of its lessee, but the Cherokee Nation elected to abstain, notwithstanding Vickery's claim of adverse ownership. If the Nation had then thought it owned this river bed, surely it also would have intervened and sought to establish its claims against its allottee, the State, and the State's lessee.

Counsel have cited no authority whatsoever to show that United States acquired or held the Louisiana Territory for the purpose of later conveying the beds of the navigable streams in Oklahoma to the Cherokees or Choctaws. The object for which the United States held the territory acquired in the Louisiana Purchase was, in the language of President Jefferson, to make "an ample provision for our posterity, and a wide spread for the blessings of freedom and equal laws." As shown in Section I of this brief, President Jefferson in his letter to Senator Breckenridge envisioned formation of states "range after range, advancing compactly as we multiply" in the Louisiana Purchase lands notwithstanding "establishments in it to the Indians." We shall discuss in more detail under Section IV the fact that a future state, or states, was contemplated for the area in which Petitioners were established. Even if we concede, for the purpose of argument, that an object for which the United States held the territory was to find a place to settle the Cherokees and Choctaws, nevertheless there is nothing whatsoever to show that to achieve that purpose or object it would be necessary to convey to them the bed of the navigable water. And furthermore, the United States did not agree to convey and did not convey that river bed. The Supreme Court, quoting the English Judge, Sir William Scott, has said in *Shively* v. *Bowlby*:

> " 'All grants of the Crown are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants; and upon this just ground, that the prerogatives and rights and emoluments of the Crown being conferred upon it for great purposes, and for the public use, it shall not be in-

tended that such prerogatives, rights and emoluments are diminished by any grant, beyond what such grant by necessary and unavoidable construction shall take away.' *The Rebeckah,* 1 C. Rob. 227, 230. Many judgments of this court are to the same effect. *Charles River Bridge Proprs.* v. *Warren Bridge Proprs.*, 36 U.S., 11 Pet. 420, 544-548 (9:773, 822-824); *Martin* v. *Waddell,* 41 U.S., 16 Pet. 367, 411 (10:997, 1013); *Central Transp. Co.* v. *Pullman Car Co.*, 139 U.S. 24, 49 (35:55, 64)."

B. THE TREATIES AND PATENTS AND CONTEMPORANEOUS CIRCUMSTANCES SHOW THAT THE UNITED STATES DID NOT INTEND TO CEDE THE RIVER BED TO EITHER OF PETITIONERS.

The discussion of the pertinent treaties and patents which follows will fully substantiate our contentions. They are listed in chronological order with a brief description concerning the nature of each.

CHEROKEE TREATIES AND PATENT

1. *Treaty of July 8, 1817, 7 Stat. L. 156.* This treaty covered a cession of land occupied by the Cherokee Nation in return for lands near the Arkansas and White Rivers. Of interest is the fact that Article 5 describes the lands granted to the Cherokee Nation on the Arkansas River as commencing:

> ". . . on the *north side of the Arkansas river* at the mouth of the Point Remove or Budwell's Old Place; thence, by a straight line, northwardly, to strike Chataunga Mountain, or the hill first above Shield's Ferry on White River, . . ." (Emphasis ours.)

Removal was entirely voluntary under this treaty, but there was no national will for the individual Indians to remove themselves from their eastern lands to the wilds of the western country in Arkansas.

2. *Treaty of May 6, 1828, 7 Stat. L. 311. This treaty was negotiated with the western Cherokees* to define the limits of the Cherokees' new home in the West—limits which were different from those contemplated by the treaties of 1817 and 1819—and included the following promise:

> "ARTICLE 2
>
> "The United States agrees to possess the Cherokees, and to guarantee to them forever, and that guarantee is hereby solemnly pledged, of seven millions of acres of land, to be bounded as follows, viz:
>
> "Commencing at that point on the Arkansas River where the Eastern Choctaw boundary line strikes said River, and running thence with the Western line of Arkansas, as defined in the foregoing article, to the South West corner of Missouri, and thence with the Western boundary line of Missouri till it crosses the waters of Neosho, commonly called Grand River, thence due West to a point from which a due South course will strike the present North West corner of Arkansas Territory, thence continuing due South and on with the present Western boundary line of the Territory to the main branch of the Arkansas River, thence down said River to its junction with the Canadian River; and thence up and between said Rivers Arkansas and Canadian, to a point at which a line running north and south from River to River, will give the aforesaid seven millions of acres . . ."

The signatory parties to this treaty were the United States and "the Chiefs and the HeadMen of the Cherokee Nation

of Indians, *West of the Mississippi*, they being duly authorized and empowered by their Nation." *Since this was not executed by those Cherokees remaining in the East, it was not binding on the great majority of the Cherokees.*

3. *Treaty of February 14, 1833, 7 Stat. L. 414.* This was another treaty made with the Chiefs and HeadMen of the Cherokee Nation of Indians *West of the Mississippi*, and it guarantees those lands described in Article 2 of the Treaty of May 6, 1828, cited above. Under Article 1 of that treaty the United States agrees to:

> ". . . possess the Cherokees and to guarantee it to them forever, and that guarantee is hereby pledged of seven millions of acres of land to be bounded as follows, viz:—Beginning at a point on the old western territorial line of Arkansas Territory, being twenty-five miles north from the point, where the territorial line crosses Arkansas River; thence running from said north point, south, on the said Territorial line, to the place 'where said Territorial line crosses the Verdigris River; thence down said Verdigris River to the Arkansas river; thence down said Arkansas to a point, where a stone is placed opposite to the east or lower bank of Grand river, at its junction with the Arkansas; thence running south, forty-four degrees west, one mile; thence in a straight line to a point four miles northerly from the mouth of the north fork of the Canadian; thence along the said four miles line to the Canadian; thence down the Canadian to the Arkansas; thence down the Arkansas, to the point on the Arkansas, where the eastern Choctaw boundary strikes said river, and running thence with the western line of Arkansas Territory as now defined, to the southwest corner of Missouri; thence along the western Missouri line to the land assigned the Senecas; thence on the south line of the Senecas to Grand River; thence up said Grand

> River, as far as the south line of the Osage reservation, extended if necessary; thence up and between said south Osage line, extended west if necessary, and a line drawn due west, from the point of beginning, to a certain distance west, at which a line running north and south, from said Osage line, to said due west line, will make seven millions of acres within the whole described boundaries . . ."

Through constant overtures from Washington and the harrassment of hostile legislation it became clear to the Cherokees that removal was imminent, either voluntarily or by compulsion. They chose, though not without internal turmoil, to remove voluntarily.

4. *Treaty of December 29, 1835, 7 Stat. L. 478. This is the treaty commonly referred to as the Treaty of New Echota, and it is the basis for the patent issued to the Cherokees by the United States of December 31, 1838. This was also the first treaty in which the United States agreed with the Cherokees BOTH EAST AND WEST.* Article 2 therein recites the previous quoted sections from the treaties of May 6, 1828, and February 14, 1833, with the Cherokees west of the Mississippi. Delegates from the Western Cherokees agreed to the provisions of this treaty "in behalf of the western Cherokees." Thus, this is the principal agreement relating to the removal encompassing those who had voluntarily removed west and those constituting the great majority of the tribe that had chosen to remain on the eastern lands.

5. *The patent to the Cherokees dated December 31, 1838, was issued pursuant to the treaties of May 6, 1828, February 14, 1833, and December 29, 1835.* It provides, in

part, that the United States has caused the seven million acres to be surveyed in one tract and states with respect to the lands under dispute:

> ". . .; thence down the Canadian river on its north bank, to its junction with Arkansas river; *thence down the main channel of Arkansas river, to the Western boundary of the State of Arkansas, at the northern extremity of the eastern boundary of the lands of the Choctaws, on the South bank of Arkansas river, four chains and 54 links, East of Fort Smith;* thence north seven degrees, twenty-five minutes west, with the western boundary of the State of Arkansas, seventy six miles, sixty four chains and fifty links to the Southwest corner of the State of Missouri;" (Emphasis ours.)

This description was prepared from the field notes of surveys made under the direction of Isaac McCoy which are discussed later in this brief. The Arkansas River is (and was then) a meandering stream and the reference to the main channel was to emphasize the main portion of the Arkansas River as distinguished from secondary channels or oxbow lakes resulting from "cut-throughs." *This description establishes without doubt that the northeast corner of the lands of the Choctaws was on the south bank of the Arkansas River.* Further analysis shows that this boundary is not described as being the center line of the River (for that portion from the mouth of the Canadian to the Arkansas state line), or the south bank thereof, but "thence down the main channel of the River to the Western boundary of the state of Arkansas." Surely McCoy knew the difference between the north bank, the middle of the stream, and the south bank, for he had just concluded a line on the north bank of the Canadian. Why then did he not state on

the north bank of the Arkansas River if that is what was intended? For the reason just stated, the Arkansas was a meandering, wandering stream with many threads or channels between the cut banks. He (McCoy) had to distinguish between those threads and that which constituted the "cloth" of the River. He was also guided by the description in Article 2 of the Treaty of May 6, 1828, in which the signatories described "the *main branch* of the Arkansas River" apparently in the belief that other branches existed. With respect to the Canadian River on the other hand, where the line expressly followed the "north bank," we think it is reasonable to assume that the parties to the grant felt this specification was necessary where the boundary was a *non-navigable stream.*

After the line which runs "down the main channel of the Arkansas River, to the Western boundary of the State of Arkansas," the description then refers to the northern extremity of the eastern boundary of the land of the Choctaws on the South bank of the River. Thus, it appears that the surveyor used the northeast corner of the Choctaw lands as a monument or reference point. We submit that "opposite" the northern extremity of the eastern boundary of the land of the Choctaws would have been more meaningful than "at" the northern extremity.[3] *However, an examination of the survey plat made by McCoy and from which this patent was prepared makes it clear that the southern boundary of the Cherokees from the mouth of*

[3]For a similar meaning of the term, see The Treaty of Doak's Stand, 7 Stat. L. 210, and Treaty of July 8, 1817, 7 Stat. L. 156, described in Section IIc. For example also, in construing a description in a deed, "at" signifies nearness and is a relative term. 23 Am.Jur.2d *Deeds* 243.

the Canadian to the Arkansas state line follows the north bank of the Arkansas River.[4] Equally conclusive, the field notes of the survey of the eastern boundary of the Cherokees[5] made in 1831 under McCoy's[6] direction are absolute in their terminology:

> "Miles 76. Thence at 12.50 chains left the canebrake and entered an open prairie bottom—rich soil, 50 chains to cane again; 80 chains to the *north bank of Arkansas River*—set a stake and made round it, from which L 64° 20′ W., a cottonwood, marked C. L. 76 M. S. 36° 00′ E. a cottonwood marked U.S. 76M. *At this point is fixed the southeast corner of the Cherokee lands; 77 M.* Thence along the channel of the river 64.50 chains to *the south bank where the northern extremity of the eastern boundary of the Choctaw lands strikes the Arkansas River.*" (Emphasis ours.)

The corners are clearly located by this survey, the southeast corner of the Cherokee lands being on the north bank of the Arkansas River, and the northeast corner of the Choctaw lands on the south bank of the River.

The above field note was excerpted by counsel for Cherokees at page 30 of their brief, and, for obvious rea-

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[4]Appendix 3—The broad line denoting boundary follows the north bank of the River from the mouth of the Canadian to the Arkansas state line.

[5]Appendix 4—Miles 7 thru 68 of the field notes have been omitted. These are not pertinent to this brief.

[6]The Court may be interested in the background of Isaac McCoy who directed these surveys. For many years, he (McCoy) played a prominent role in dealings with the Cherokees and other Indians. "Advancing the Frontier," by Grant Foreman. Senate Document No. 281, 52nd Congress, 1st Session, February 25, 1892, contains a letter dated July 5, 1836, from C. A. Harris, then Commissioner of Indian Affairs, to Reverend Isaac McCoy which directs Mr. McCoy to employ a competent surveyor and to run and mark the lines established in the Treaty of New Echota.

sons, they omitted that portion of the note which fixed "the southeast corner of the Cherokee lands" on the "north bank of the Arkansas River." Counsel apparently failed to check the appendix of their own brief at page F-12 where the field note for Miles 76 is set out in full as above. For convenience, a reproduction of the handwritten copy of the pertinent field note as it appears in the National Archives is included as our Appendix 4.

CHOCTAW TREATIES AND PATENT

1. *Treaty of October 18, 1820, 7 Stat. L. 210. The Treaty of Doak's Stand.* This is the first agreement concerning the cession by the Choctaw Nation of land east of the Mississippi in exchange for lands west of the Mississippi. Article 2 of this treaty describes the lands to be ceded as:

> "Beginning on the Arkansas River, where the lower boundary line of the Cherokees strikes the same; thence up the Arkansas to the Canadian Fork, . . ."

2. *Treaty of January 20, 1825, 7 Stat. L. 234.* This was a treaty in which the Choctaws ceded that part of their land now in the State of Arkansas to the United States.

3. *Treaty of September 27, 1830, 7 Stat. L. 333. The Treaty of Dancing Rabbit Creek.* (This treaty is supplemented by Treaty of January 17, 1837, 11 Stat. L. 573). It provides:

> "All other treaties heretofore existing and inconsistent with the provisions of this are hereby declared null and void."

Our statements concerning the Treaty of New Echota apply with equal validity to the Treaty of Dancing Rabbit

Creek. From the uncluttered language of this treaty and the subsequent patent, it is manifest that there was no purpose to grant the Arkansas River or any part thereof to the Choctaws. Article II of the treaty provides for a conveyance of the same land described in the Treaty of Doak's Stand.

Article IV provides:

> "The Government and people of the United States are hereby obliged to secure to the said Choctaw Nation of Red People the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation of Red People and their descendants; and that no part of the land granted them shall ever be embraced in any Territory or State; *but the U.S. shall forever secure said Choctaw Nation from, and against, all laws except such as from time to time may be enacted in their own National Councils, not inconsistent with the Constitution, Treaties, and laws of the United States; . . .*" (Emphasis ours.)

Since it was established law that lands under navigable waters be reserved for the ultimate benefit of future states "unless the intention was definitely declared or otherwise made very plain," and no intention or definite declaration to this effect was made in this treaty or any other treaty with the Choctaws, it then follows that a construction of this treaty that it covered lands beneath navigable waters would result in an inconsistency with the laws of the United States—and that is expressly prohibited by the language quoted above.

Counsel for the Choctaws has argued that Article XI of this treaty is not indicative that the Choctaws did not receive lands beneath navigable waters. It provides:

> "Navigable streams shall be free to the Choctaws who shall pay no higher toll or duty than citizens of the United States. It is agreed further that the United States shall establish one or more post offices in said Nation, and may establish such military post roads, and posts, as they may consider necessary."

His proposition that "at the most, by the Treaty of 1830, the United States only reserved a navigation easement on the Arkansas River" is not well-founded. Counsel states that the United States reserved an easement, *but this language can't be found,* and that the Choctaws acquired the navigable streams in the area *through a provision that is also missing.* It is quite obvious that if the United States had granted the navigable waters and had reserved a navigation easement that it would have been simpler to so state. On the contrary, the United States, being the grantor, did not need to reserve something that it did not grant; the easement was to the Choctaws, not to the United States.

In *Waddell,* the Court inquired into the character of one claiming under the British Crown. The Court said that the European possessions in America were not claimed by right of conquest but by right of discovery; according to the principles of international law as then understood by the civilized powers of Europe the Indian tribes in the new world were regarded as mere temporary occupants of the soil; and the absolute rights of property and dominion were held to belong to the discovering European Nation. Counsel for the Choctaws argues that this has little application, for

it was not intended by the United States under the terms of the treaties or the grants that it would reserve the bed of the navigable portion of the Arkansas River for the *benefit of a future state.* This is reasoning from a false premise for new states were in mind long before the treaties with the Cherokees and the Choctaws, as we show elsewhere in this brief.

4. *Patent issued to the Choctaws on March 23, 1842.*[7]

"The United States under a grant specially to be made by the President of the United States shall cause to be conveyed to the Choctaw Nation a tract of Country West of the Mississippi river in fee simple, to them and their descendants, *to inure to them while they shall exist as a Nation and live on it:*

"Beginning near Fort Smith where the Arkansas boundary crosses the Arkansas river, running thence to the source of the Canadian fork, if in the limits of the United States, or to those limits; thence due south to Red river and down Red river to the west boundary of the territory of Arkansas; thence North along that line to the beginning." (Emphasis ours.)

The above italicized language is similar to that in the Cherokee patent, and it clearly indicates that the tenure of the grant was limited to the period of occupancy by the Choctaws as a nation.

With respect to the above patent and the language "Beginning near Fort Smith where the Arkansas boundary crosses the Arkansas river," Counsel for the Choctaws urges that "crosses" could only mean "crosses to the other side" of or the north bank of the Arkansas River. If so, why

[7]Appendix 5.

wasn't it so stated? The simple contradiction of this is found in the survey and we ask that the Court examine the surveys made under the direction of Isaac McCoy[8] and all of the other details indicating that the northeast corner of the Choctaw lands was at the south bank of the Arkansas river just north of the old fort.

Counsel for the Choctaws has argued that the boundary of the Choctaws extended to the north bank of the Arkansas under the Treaty of Doak's Stand. Any inconsistency which may exist between the Treaty of Doak's Stand and the Treaty of Dancing Rabbit Creek must be resolved by the latter treaty for it provides:

> *"And that this may be considered the treaty existing between the parties all other treaties heretofore existing and inconsistent with the provisions of this are hereby declared null and void."*

5. *Treaty with the Choctaws and Chickasaws of June 22, 1855, 11 Stat. L. 611.* This treaty provides for boundaries of the Choctaw and Chickasaw lands, a district for the Chickasaws and a district for the Choctaws, a common right of settlement by members of either tribe in either district, and many more provisions for the adjustment and readjustment of the relations between these two tribes. Of importance is Article 1:

> "The following shall constitute and remain the boundaries of the Choctaw and Chickasaw country, viz: *Beginning at a point on the Arkansas River, one hundred paces east of old Fort Smith, where the western boundary-line of the State of Arkansas crosses the*

[8]Appendices 3 and 4.

said river, and running thence due south to Red River; thence up Red River to the point where the meridian of one hundred degrees west longitude crosses the same; thence north along said meridian to the main Canadian River; thence down said river to its junction with the Arkansas River; *thence down said river to the place of beginning . . .*" (Emphasis ours.)

The beginning point is *on* the Arkansas River and not in the River or *on the opposite bank* from Fort Smith. The last call reads "down said river" and not down the middle of the river or the opposite bank. This seems to us the most reasonable interpretation of this description.

The history of the surveys of the lands of the Cherokees and Choctaws was very carefully traced by I. D. C. Atkins, the Commissioner of Indian Affairs in a letter dated May 11, 1886, addressed to the Secretary of the Interior and included as Cherokee's Appendix F. This is recommended to the Court's careful reading and we will not burden the Court with quotations except to point out some of the important parts. Without question, this letter is the most detailed account of the surveys written during this period. At page 12, the Commissioner recites from a report dated December 24, 1821, by Henry Downs, Commissioner of Indian Affairs, to the Secretary of War, regarding a survey of the eastern Choctaw boundary line:

"Sunday, 23rd, at 115 miles 10 chains and 50 links, the south bank of the Arkansas River, the corner post marked on the south side M. 115, 10 Chs., 50 links, on the west side C.N., on the east side U.S., distance from the *Cherokee corner on the north bank of the river*, one mile and thirty chains, Arkansas River 630 yards wide. October 4th started from a post on the south side

> of the Arkansas, opposite the lower boundary of the Cherokees to meander the Arkansas." (Emphasis ours.)

On page 13, the Commissioner notes that from the plat it appears that the northern terminus of the line of the eastern Choctaw boundary is at a point on the south bank of the Arkansas River, or in the channel of the river. He comments that the field notes cannot be found, so this is apparently the reason for his doubt as to whether this is at a point on the south bank of the Arkansas River or in the channel. There are other references to later surveys which were generally confusing to the officials of the Department and to the Indians. Although the Commissioner's prime purpose was to recommend the removal of the Cherokee Morgan from the lands south of the River, *he points out in considerable detail that all of the early surveys fixed the southeast corner of the Cherokees on the north side of the River and the northeast corner of the Choctaws on the south side of the River.* He finds that the passage of time and the movement of the River obliterated the earlier corners, and that in subsequent surveys, the surveyors had no little difficulty in determining this location. *We must emphasize here that the earlier surveys were the ones from which the patents were prepared.*

C. THE INTENTION EXPRESSED IN THE TREATIES AND PATENTS WAS TO PROVIDE FOR CONVEYANCE TO EACH OF PETITIONERS OF A GENERAL AREA OR A SPECIFIED QUANTITY OF LAND, AND EACH REFERENCE TO THE ARKANSAS RIVER WAS SOLELY AS A BOUNDARY, A MONUMENT OR A REFERENCE POINT.

There is no language whatsoever that shows that it was the intention to convey the fee title to the river bed between its high-water marks. Phrases such as "to the Arkansas River," "down the Arkansas," "thence down the main channel of the Arkansas," fall far short of evidencing a definite and specific intention to convey the entire bed of the Arkansas River between its high-water marks or any part thereof to the Cherokees or Choctaws.

The court below held that these phrases define no specific intent to convey. In their brief, at pages 39 and 40, the Cherokees attempt to refute this by a quotation from *State of Iowa* v. *State of Illinois*, 147 U.S. 1, 10 and 11, 37 L.Ed. 55 (1892). Counsel has omitted language from the quotation which is not only pertinent but gives a meaning to the quotation entirely different than that represented by counsel for Cherokees. The entire quotation is:

> "The Enabling Act of August 6, 1864 (9 Stat. at L. 56) under which Wisconsin adopted a constitution and became a state and was admitted into the Union, gives the western boundary of that state, after reaching the river St. Croix, as follows: 'Thence down the main channel of said river to the Mississippi, thence down the centre of the main channel of that' (Mississippi) 'river to the northwest corner of the state of Illinois.' The northwest corner of the state of Illinois must therefore be in the middle of the main channel of the river

> which forms a portion of its western boundary. *It is very evident that these terms, 'middle of the Mississippi river,' and 'middle of the main channel of the Mississippi river,' and 'the centre of the main channel of that river,' as thus used, are synonymous.*" (Emphasis ours.)

Thus, the Court did not say, as represented by counsel for Cherokees, that the terms "down the main channel" and "down the centre of the main channel" are synonymous.

Further, this Court did not follow the reasoning of the Supreme Court of Iowa, also quoted by counsel at page 40 of their brief, but instead stated:

> "The opinions in both of these cases are able and present, in the strongest terms, the different views as to the line of jurisdiction between neighboring states, separated by a navigable stream; but we are of opinion that the controlling consideration in this matter is that which preserves to each state equality in the right of navigation in the river. We therefore hold, in accordance with this view, that the true line in navigable rivers between the states of the Union which separates the jurisdiction of one from the other is the middle of the main channel of the river. Thus the jurisdiction of each state extends to the thread of the stream, that is, to the 'mid-channel,' and, if there be several channels, to the middle of the principal one, or, rather, the one usually followed."

This Court, therefore, held that the term "channel" referred to navigable waters, and not to the river bed containing normal high water. As counsel for the Cherokees points out, however, this was a case determining the *boundary between states which obtained* title to the beds of navigable rivers upon entering the Union, and not one wherein

this Court was determining the accuracy of the language of a grant, or the intent of the United States as to whether the lands underlying navigable waters were conveyed to the grantee prior to the admission of a state.

The claims of Petitioners are based on the premise that they became owners of the fee simple title to the lands ceded to them, and that in making the grants to them, the United States guaranteed that the areas would never be embraced by any state or territory. To this, the Cherokees would add that the grant to them was made as to a sovereign nation. In fact, the treaties and patents show that the grants *were qualified* with reverter to the United States if the tribes should cease to exist or to live upon the land, and it is submitted that both the Indians and the United States were concerned about imposition of state or territorial governments in which the Indians had no voice. We submit that statehood and citizenship for all the residents of the lands acquired by the United States from France was the avowed intention when these lands were first acquired, and this announced intention was ultimately accomplished with the consent of the people who resided there.

The obvious intent of the treaties and the patents was to grant and assure to the Indians a general area or specified quantity of land—in the case of the Cherokees, seven million acres of land plus certain additions; and in the case of the Choctaws, a large unmeasured territory. A review of the successive treaties reveals that references to the Arkansas River in the land descriptions were incidental to the primary intent. The Cherokee patent finally embodied a surveyed description, but it was issued pursuant to and in

fulfillment of the treaties. The Choctaw patent described the lands as did the treaties.

In contrast with the Indian treaty descriptions, consider the language used in a contemporary document—the description of the territory contained in the Act of Admission, approved March 6, 1820, 3 Stat. L. 545, for the admission of the State of Missouri into the Union. In that Act it was declared that the state should consist of the territory included within the following boundaries:

> "*Beginning in the middle of the Mississippi River,* on the parallel of thirty-six degrees of north latitude; thence west, along that parallel of latitude, to the St. Francis river; thence up and *following the course of that river, in the middle of the main channel thereof,* to the parallel of latitude thirty-six degrees and thirty minutes; thence west along the same to a point where the said parallel is intersected by a meridian line passing through *the middle of the mouth of the Kansas river,* where the same empties into the Missouri river; thence from the point aforesaid, north, along the said meridian line, to the intersection of the parallel of latitude which passes through the rapids of the river Des Moines, making the said line to correspond with the Indian boundary line; thence east from the point of intersection last aforesaid, along the said parallel of latitude, *to the middle of the channel of the main fork of the said river Des Moines; thence down and along the middle of the main channel* of the said river Des Moines, to the mouth of the same, where it empties into the Mississippi river; thence due east *to the middle of the main channel of the Mississippi river;* thence down and following the course of the Mississippi river, *in the middle of the main channel thereof,* . . ." (Emphasis ours.)

If the middle of the river were intended, the middle of the river was described.

Our Appendices 6 and 7 are maps showing the Cherokee lands under the 1828 treaty and 1833 treaty, respectively. The land descriptions in these treaties are shown in detail on these maps, and the maps are essential to understanding the discussion immediately following.

The Treaty of July 8, 1817, with the Cherokees was made, in part, for the purpose of granting to certain of the Cherokees, lands in the West. This land, in what is now the State of Arkansas, was to be given in exchange "for a just portion of the country" which the Indians were to leave behind. The agreement of the United States was

> "to give to that part of the Cherokee Nation on the Arkansas as much land on said river and White River as they have or may hereafter receive from the Cherokee Nation east of the Mississippi, *acre for acre*, as a just proportion due that part of the Nation on the Arkansas agreeably to their numbers; which is *to commence on the north side of the Arkansas River*, at the mouth of Point Remove or Budwell's Old Place; thence by a straight line, northwardly, to strike Chataunga mountain, or the hill first above Shield's Ferry on White River, *running up and between said rivers for complement*, the banks of which rivers to be the lines . . ." (Emphasis ours.)

By the year 1828, there were so many non-Indians encroaching on the area that the original purpose of the grant was defeated. In the treaty of May 6, 1828, with the Cherokees, the United States agreed (Art. 2) to possess the Cherokees, and guarantee to them forever *seven million acres of land* bounded on the east by the western boundary of

Arkansas as defined in the 1825 treaty with the Choctaws. In this 1828 treaty, after one reasonably definite area was described, there was one indefinite area described, namely, that area "up and between said Rivers Arkansas and Canadian, to a point at which a line running North and South from River to River, *will give the aforesaid seven millions of acres.*" In the 3rd article of the treaty the United States agreed to have the lines of the above cession run without delay. See map, our Appendix 6.

In the treaty with the Western Cherokees under date of February 14, 1833, the description of the lands to be given the Cherokees was changed. Again, however, the guarantee to the Indians was the possession of *seven millions of acres of land,* together with "a perpetual outlet west and a free and unmolested use of all the country lying west of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extended . . ." Again there was included an indefinitely bounded area, namely "up and between said south Osage line, extended west if necessary and a line drawn due west, from the point of beginning, to a certain distance west, at which, a line running north and south, from said Osage line, to said due west line, *will make seven millions of acres* within the whole described boundaries." (Emphasis ours.) See map, our Appendix 7.

The treaty of December 29, 1835, with the Cherokees confirmed the description of the lands contained in the treaty of February 14, 1833, with the Western Cherokees, and added to the lands an area estimated to contain 800,000 acres in what is now the southeast corner of Kansas.

With respect to the Cherokee lands, in a succession of treaties, the description of the lands to be ceded progressed from the agreement in 1817 to exchange "acre for acre," through agreements to grant seven million acres of land plus a western outlet, to a final patent in 1838 of 14,374,-135.14 acres for which specific boundaries were prescribed. It seems amply clear that the amount of acreage and its general location were the primary concern of the Cherokees.

Under the treaty of October 18, 1820 (Treaty of Doak's Stand), in consideration for the cession by the Choctaws to the United States of certain specified lands, the United States ceded to the Choctaws:

> "a tract of country west of the Mississippi River, situate *between the Arkansas and Red River*, and bounded as follows:—Beginning on the Arkansas River, where the lower boundary line of the Cherokees strikes the same; thence up the Arkansas to the Canadian fork, and up the same to its source; thence due South to the Red River; thence down Red River, three miles below the mouth of Little River, which empties itself into Red River on the north side; thence a direct line to the beginning."

The boundaries of this grant were to be ascertained and distinctly marked.

Note that in the foregoing description of the Choctaw lands, the phrase "where the lower boundary of the Cherokees strikes" the Arkansas River referred to the grant in 1817 to the Cherokees. That point was on the north bank of the Arkansas, but the Choctaw lands were clearly limited to those south of the Arkansas River.

By treaty of January 20, 1825 with the Choctaws, to fix the western boundary of Arkansas, the Choctaws ceded to the United States all that portion of lands granted to them by the Treaty of Doak's Stand which lay east of a line beginning on the Arkansas one hundred paces east of Fort Smith and running thence due south to Red River.

As has been noted, in the 1820 treaty, with the Choctaws, the western boundary of their land was designated as the source of the Canadian fork of the Arkansas River, running thence due south to the Red River. In the treaty of September 27, 1830, the indefinite westerly boundary of the Choctaw lands was again prescribed. The patent issued March 23, 1842, pursuant to the treaty, contained the same general and indefinite description of the lands.

It seems inconceivable that the Choctaws, in accepting a grant of millions of acres of lands described with such broad strokes of the brush, gave any thought to the Arkansas River except as a boundary after the initial designation in 1820 of "a tract of country west of the Mississippi River, situate between the Arkansas and Red River."

Viewed through the eyes of a drafter of legal descriptions, the land descriptions in the treaties, standing alone, actually exclude the river beds. This is graphically shown for the Cherokee treaties of 1828 and 1833 in the two maps, our Appendices 6 and 7.

The exact location of the Indian lands was uncertain, as may be seen.

"WAR DEPARTMENT, January 17, 1831

"Sir: I send you the enclosed map, which has been carefully prepared in reference to the various treaties which, at different times, have been concluded with the

Indians. To preserve quiet amongst them, it is important that each tribe should know the precise boundary of his country. The Government should run their lines, and have them plainly marked.

"The Cherokee treaty calls to run north with the Arkansas and Missouri western boundaries, until it crosses the Grand river of the Neosho. Now, where Grand river is situated we have no information, and, until it be ascertained, *it is impossible to tell how far west this tribe can claim between the Arkansas river and Canadian fork, along which they are to run to make their complement of seven millions of acres. The entire country of the Cherokee will require to be surveyed. Of the Choctaws only a part need be surveyed, as most of the cession to them has natural boundary.* A country also for the Creeks and Chickasaws should be surveyed: neither has been done.

"The distances and boundaries to be surveyed cannot be accurately computed; and hence no certain estimate of expense can be made for so remote a service, and in a country where supplies are scarce, and difficult to be had. I would suppose, however, that $10,000 might answer.

"I submit these things for your consideration, believing that your committee will perceive and admit their importance.

"Very respectfully, &c.,
"JOHN H. EATON.

"To the Hon. John Bell,
Ch. Com. Indian Affairs H.R.U.S." (Emphasis ours.)

On April 13, 1831, Mr. Eaton wrote to the Rev. Isaac McCoy, giving him instructions on the surveys of Indian lands which Mr. McCoy had been appointed to make. That letter reads in part, as follows:

"The first call of the treaty is to run north from Fort Smith, along the Arkansas and Missouri western boundary, until it cross the waters of the Grand river of the Neosho. Our maps do not show where Grand river is. There is a Grand river laid down, but this falls into the Missouri, and hence is not the stream intended by the treaty. This is a matter open to parole proof, and is to be settled in no other way. It will be incumbent on you, therefore, to obtain all the information you can as to the identity of this particular stream; and if nothing satisfactory can be obtained, you will proceed north until you cross the largest stream which runs into the Neosho, and designate that as your farthest northern boundary. The next course west, and the distance suggests no difficulty—the former Arkansas boundary, it is supposed, being a matter of notoriety.

"Having ascertained these two calls, and made your calculation of the number of acres contained, it will then become necessary that *you meander along the Arkansas and the Canadian fork, with a view correctly to determine how far it will be necessary to proceed up and between these two streams to make up the complement of 7,000,000 of acres secured to them by treaty.*" (Emphasis ours.)

Both letters are found in Document 512—Correspondence on the Subject of the Emigration of Indians, Vol. II, the first letter at page 266, the second commencing on page 275.

As previously noted, both the 1828 and 1833 treaties with the Cherokees left an open-ended area which could be determined only by survey of all the Cherokee lands.

In the description of the lands guaranteed to the Cherokees in the Treaty of May 6, 1828, the westerly boundary,

drawn from the north, strikes the Arkansas River, runs down the Arkansas River to its junction with the Canadian River, and *thence up and between the Arkansas and Canadian Rivers to an indefinite line.* This is a clear exclusion of that part of the Arkansas River which lies between lands guaranteed to the Cherokees.

However, by treaty of January 24, 1826 with the Creek Indians, the latter had been invited to select lands for settlement, and a portion of those lands upon which they settled was this same land between the Arkansas and the Canadian Rivers which the 1828 treaty guaranteed to the Cherokees. A settlement was made between the Creeks and the Cherokees, and the boundary line between them was fixed by treaties, each dated February 14, 1833. (Treaty with the Western Cherokee, 7 Stat. L. 414, II Kappler 385; Treaty with the Creeks, 7 Stat. L. 417, II Kappler 388). Lands to be given to the Cherokees were designated anew, with the boundary line between the Creek and Cherokee lands (part of the westerly boundary of the Cherokee lands) very specifically fixed. A surveyed line, or its equivalent, was used to define the westerly limit of the Cherokee lands in that area between the Canadian and the Arkansas Rivers. That portion of the Cherokee lands which was left with an indefinite western boundary was shifted to the area between two east-west lines, of which the north one was the south Osage line and the south one was a line running due west from point of beginning. The westerly line in this indeterminate area was specified to be one which *would make seven millions of acres* within the whole described boundaries. (See map, our Appendix 7.)

It may thus be seen that the westerly boundary of the Cherokee lands lying between the Canadian and Arkansas Rivers was not drawn with the intention of including any portion of the Arkansas River within the whole boundaries of the Cherokee lands. It was merely the settlement of a boundary line between the Creek and Cherokee lands. There was nothing in the circumstance of fixing this line that changes the designation of the Cherokee lands in this area as being "up and between the rivers."

Both the 1820 treaty and 1830 treaty, with the Choctaws, as well as the patent issued to the Choctaw Nation, define the western limit of the Choctaw lands as being the source of the Canadian fork of the Arkansas. The 1830 treaty added "if in the limits of the United States, or to those limits." This same wording was used in the patent. This is hardly the definitive wording that one expects in a deed of conveyance.

We submit that the only clear intent of these land descriptions is, for the Cherokees, the grant of a specified amount of acreage (not river bed) and, for the Choctaws, a vast area running from the Arkansas territorial boundary to the western limits of the United States between the Red River and the Canadian fork of the Arkansas.

Ownership of rivers and river beds was left to be determined under basic principles of law. Many hundreds of miles of the beds of non-navigable streams were ceded to Petitioners. The navigable portion of the Arkansas River was retained by the United States and was vested in Oklahoma at statehood.

III

AT THE TIME OF THE TREATIES THERE WERE SPECIFIC AND COMPELLING REASONS FOR RETENTION BY THE UNITED STATES OF TITLE TO THE NAVIGABLE PORTION OF THE ARKANSAS RIVER BED, APART FROM POLICIES COMMON TO ALL NAVIGABLE WATERS.

Petitioners attempt to lend support to their principal contention—that the "implied trust-equal footing" doctrine is here inapplicable because at the time of the relevant treaties and patents the United States affirmatively intended that the granted lands would never be included within any future territory or state, a proposition squarely refuted in Section IV below—by arguing also that there was then no conceivable reason for retention of title to the river bed by the United States.

This argument will not survive analysis.

Quite apart from the "implied trust-equal footing" doctrine which was applicable to all navigable waters, and specifically with respect to the Arkansas River, at the time of the treaties there were at least these compelling reasons for retention of title by the United States:

1. The acquisition of full control and use of the Mississippi River ". . . *and all the streams that enter into it, from their sources to the ocean* . . .,"[9] was one of the paramount reasons for the negotiations culminating in the Louisiana Purchase in 1803.

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[9]Letter dated May 13, 1803, from Robert Livingston and James Monroe to James Madison, State Papers and Correspondence Relating to the Purchase of The Louisiana Territory, U.S. Government Printing Office, 1903.

The vital public importance of the tributaries of the Mississippi River had been a preoccupation of our founding fathers:

> "To preserve the national character of *all the rivers leading into the Mississippi* and St. Lawrence and to prevent a monopoly of their waters, was the purpose of the Ordinance of 1787, declaring them to be free to the public; and so important was the provisions of this Ordinance deemed by Congress that it was imposed on Wisconsin as a condition of admission into the Union." *U. S.* v. *The Montello, etc.*, 87 U.S. 430, 22 L.Ed. 391, 395, 20 Wall. 430 (1874). (Emphasis ours.) Journals of The Continental Congress 1774-1789, Vol. XXXII (1787), G.P.O. 1936, pages 314, 319.

Further, valuable minerals were thought by early explorers to exist all along the Arkansas—a possibility still unresolved at the time of the treaties and patents here at issue, and a hopeful development of which Congress was fully aware.

In the debate on the Act Erecting Louisiana Into Two Territories and Providing for the Temporary Government Thereof (Act of March 26, 1804, 2 Stat. L. 283), Congressman Samuel L. Mitchill from the Committee of Commerce and Manufacturers reported:

> "The Arkansas, which has already been traced above one thousand miles, also seems worthy of being explored with more care into a greater extent than has hitherto been done. A spacious plain and valley encrusted annually (like the soil in some spots about the Persian Gulf) with native salt, in quantities sufficient to impregnate a branch of the Arkansas, and occasionally the river into which it falls, with its briney quality, and to make it a salt river down to the settle-

ment of Ouisarque for considerably more than 600 miles of its course, might be mentioned as no ordinary occurrences. *That masses of virgin silver and gold glitter in the veins of the rocks which underlay the Arkansas itself and mingle with the minerals near certain other of its streams,* and offer themselves to the hand of him who will gather, refine, and convert them to use, are no less uncommon and wonderful. These extraordinary productions might be dwelled upon at considerable length, in this report; *but, credible as both the relations are, the committee forebear to offer anything more than that the existence of a salt river, precious mines and ores, and of some other remarkable objects are stated upon solid and credible testimony.* Omitting these things, it is not necessary to be urged to Congress, the Committee considered that the latitude, longitude and relative situation of the source of the Arkansas, are themselves of sufficient moment to render their attainment very desirable." (8th Congress, 1st Session, Annals of Congress, pages 1124, *et seq.*) (Emphasis ours.)

Clearly, a grant by the United States to any Indian tribe or tribes of a national asset of such value and importance should not be lightly inferred.

In addition, the Arkansas River was even then an important avenue of commerce and communication.

For several years *prior* to the grants to the Cherokees and Choctaws and for more than eighty years thereafter, traffic on the Arkansas River through what is now Oklahoma was an avenue over which men traveled and trade was extended. Many rivers served the area, but the greatest of these was the Arkansas.

The river traversed the eastern side of the Rockies, from Colorado, across Kansas, Indian Territory, and Ar-

kansas Territory. Connecting with this river were the Grand, the Verdigris, the Canadian, and numerous smaller streams. After crossing Arkansas Territory, the Arkansas River emptied into the Mississippi River a little north of what is now Greenville, Mississippi, going through Fort Smith, Van Buren, Little Rock, Pine Bluff, and other cities and towns in Arkansas Territory. At the mouth of the Arkansas River was Napoleon. Fort Smith was 548 miles from the mouth of the river. Fort Gibson, near the point of the confluence of the Grand River with the Arkansas, was 135 miles upstream from Fort Smith.

History records river boat navigation on the Arkansas River in the Indian Territory as early as 1822, when the boat "Eagle" brought cargo from New Orleans. In 1826 the boat "Spartan" carried cargo to Choteau's trading post, which was upstream from the mouth of the Grand (or Neosho) River. In 1828 the "Facility" carried 117 tons of merchandise and Creek emigrants to the Creek Agency, and returned to New Orleans with a cargo of 500 barrels of pecans. In 1829 the "James O'Hara," a 200-ton steamer, carried recruits for Fort Gibson, and 100 Cherokee emigrants. In 1833 seventeen boats regularly docked at Fort Gibson. There were then twenty-two established landings between Fort Smith and Fort Gibson, including Redland, Sallisaw, Webber's Falls and Vian.[10]

This actual navigation upon the Arkansas River continued from 1822 down through the advent of statehood. Thus, the Arkansas River was not only *an* important artery

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[10]Grant Foreman, *Muskogee and Eastern Oklahoma;* S. T. Abert's survey, Ex. Doc. No. 295, 41st Congress, 2d Sess.

of commerce at the time of the grants and thereafter, but probably served as *the* most important artery of commerce for this area for a half century, from 1822 to 1872, when the railroads entered the Indian Territory.

Again, as noted earlier, the trial court below took judicial notice of this fact.

> "It is the conclusion of the court as to this issue, arrived at from documents, records, reports, and articles made and filed or published contemporaneously with the pertinent times, and from published books and research material written by students of the area and the period, all of which are as readily available to the court as to the parties, that it was common knowledge in the legal sense that from at least as early as 1824 until sometime after November 16, 1907, the Arkansas River in its natural state was a navigable river below its confluence with the Grand River, *regularly used throughout the remainder of its course in what is now Oklahoma as a highway of commerce during the major portion of each year.*" (Pre-Trial Order filed September 25, 1967). (Emphasis ours.) Joint Appendix 113a.

In short, it is simply not credible, so recently after the hard negotiations in Paris, that one of the most sought-after goals of the United States, a principal tributary of the Mississippi, and a tributary still largely unexplored and unevaluated, would have been granted (in the total absence of any demand for the river by either the Cherokees or the Choctaws, and hence in the total absence of any "public exigency") without, in the stern language of *Holt State Bank*, an expression in *some* law, *some* treaty, or *some* patent in which ". . . the intention was definitely declared or otherwise made very plain."

2. The lands granted the Cherokees and the Choctaws and Chickasaws, although extremely substantial (collectively constituting most of what is now the eastern half of Oklahoma), nevertheless represented only a small portion of the vast Louisiana Purchase lands lying west of the Mississippi River. The Arkansas River coursed from the Mississippi through the State of Arkansas, through the Indian treaty lands, *and beyond,* into areas in which, as noted, some thirty-odd other Indian tribes had been relocated, and even further, into the territory north and west from which many future states would later be carved, ". . . range after range, . . ." as President Jefferson had predicted. The full extent of the navigability of the Arkansas was not then known, and it is historically unreasonable to assume that the United States would, by mere inference, and without demand, divest itself of title to this potentially important thoroughfare to its vast western lands.

3. The United States, in its treaty making with the Indians, retained, because it could not constitutionally divest itself, of two important responsibilities: that of regulating commerce between the Indians and the United States, and that of preserving the peace and protecting the boundaries not only between the Indian lands and the United States, but *the boundaries between Indian Nations as well.*[11] For these purposes, after the relocation of the Indians, United States military establishments were maintained at Fort Smith and Fort Gibson, *both served by the Arkansas River, the boundary between the Cherokees on the north bank, and the Choctaws and Chickasaws on the south bank.* The river was the supply route from the east

[11]House Report No. 474, 23rd Cong., 1st Session (1834), page 17.

to Fort Gibson, in Cherokee territory, and the communications link between the two garrisons. Regardless of the river's potential importance as an avenue to the great expanse of United States territory to the north and west, and regardless of potential mineral wealth in the river, for this reason alone it is inconceivable that the United States would have divested itself of ownership of its lifeline to Fort Gibson, a lifeline which in itself was also a boundary upon which the United States was obliged both to regulate commerce and maintain the peace. This conclusion is supported by the express language of the 1830 Choctaw Treaty of Dancing Rabbit Creek which not only provided for the establishment of such military posts in Choctaw territory as the United States might deem necessary, but which also stated that "Navigable streams shall be free to the Choctaws who shall pay no higher toll or duty than citizens of the United States," an odd provision, indeed, if the navigable Arkansas river bed had been granted to the Choctaws.

To those representatives of the United States involved in the negotiations with the Indians in the early 19th Century, the foregoing urgent practical considerations would certainly suggest the prudence of the retention of the navigable portion of the Arkansas River by the United States. More to the point here, and quite apart from the possibility of future states, these critical factors not only negate any "public exigency" or "compelling public purpose" for the (inferential) granting of the river by the United States, but beyond that, establish a manifest public need for the river's retention. *A fortiori*, in the language of *Holt State Bank*, its conveyance cannot be presumed in the absence of a definitely declared intent, expressed in plain language,

which is entirely absent in any relevant law, treaty, or patent here.

IV

THE PROVISIONS IN THE TREATIES THAT THE LANDS CEDED TO EACH OF PETITIONERS WOULD NOT, WITHOUT THEIR CONSENT, BE INCLUDED WITHIN THE LIMITS OF ANY TERRITORY OR STATE, WERE NOT INCONSISTENT WITH THE POLICIES, POWERS, AND RIGHTS OF THE UNITED STATES TO FORM A STATE FROM AN AREA WHICH INCLUDED THE LANDS CEDED TO PETITIONERS.

Petitioners and *amici curiae* voluminously argue that the main premise of the "implied trust-equal footing" doctrine—the possibility, however remote, of a future state—is missing here. They argue that this is so because the United States in its negotiations with the Indians and in its consequent treaties and patents, allegedly repeatedly and expressly disavowed any intention ever to include any lands within the boundaries of the Indian grants in a territory or a state.

At the outset it should be noted that with respect to most of the river bed here in dispute, Petitioners' argument is moot, for as is clearly shown elsewhere in this brief that part of the Arkansas river bed which divided the Cherokee and Choctaw lands was *not* "within the boundaries" of such lands, but on the contrary *constituted* the boundary, the lands of each Nation ending at the high water mark on its respective river bank or banks.

But even assuming, *arguendo*, that the disputed portion of the river lay entirely within the treaty lands, Petitioners' contention is without merit.

Despite the Petitioners' selective quotations from contemporaneous documents, the United States always contemplated not only the possibility, but much more, the hope that a future state might evolve from the relocated Indian Nations. Beyond that, however, by the very nature of the parties involved, the sovereign United States, whatever the language of the treaties with the less-than-fully-sovereign Indian Nations, and however worded the patents, always possessed the right and the power to admit to the Union a state embracing the Indian treaty lands, a legal circumstance not only fully appreciated at the time by representatives of the United States, but by the Indians as well.

In 1834, but four years after the Choctaw Treaty of Dancing Rabbit Creek and one year before the Cherokee Treaty of New Echota, the Committee on Indian Affairs of the House of Representatives, after extensive hearings, favorably reported a bill to establish a "Western Territory" stretching from Mexico (Texas) in the south to the Missouri and Platte Rivers in the north, and from the western borders of Arkansas and Missouri in the east to Mexican possessions in the west, such territory to be established for and inhabited and controlled by ". . . the emigrant and other Indian tribes therein." The bill did not pass, but the detailed accompanying report is illuminative.

> "Whatever difference of opinion may have heretofore existed, *the policy of the Government, in regard to the future condition of these tribes of Indians, may now be regarded as definitely settled.* To induce them to remove west of the Mississippi, to a territory set apart and dedicated to their use and Government forever; to secure to them there a final home; to elevate their intellectual, moral, and civil condition, and to fit them

for the enjoyment of the blessings of a free Government, is that policy. *And a further hope is now encouraged, that whenever their advance in civilization should warrant the measure, and they desire it, that they may be admitted as a State to become a member of the Union.*

"To carry that policy into effect is the object of this bill." (Emphasis ours.) House Report No. 474, 23rd Congress, 1st Session, page 14.

As an interim measure, the 1834 bill first proposed an Indian delegate to Congress, and in this connection, the committee report stated:

"The proposition for allowing Indians a delegate is not now for the first time brought forward.

"It was first suggested in 1778, and in the first treaty ever formed by the United States with any Indian tribe. The treaty with the Delawares of the 17th September, 1778, contains the following article: 'And it is further agreed on, by the contracting parties, (should it, for the future, be found conducive for the interests of both parties) to invite any other tribes who have been friends to the interests of the United States, to join the present confederation, and to form a State, whereof the Delaware nation shall be the head, and have a representative in Congress: Provided, Nothing contained in this article is to be considered as conclusive until it meets with the approbation of Congress.'

"In the treaty of Hopewell, of 1785, is the following article: 'Article 12. That the Indians may have full confidence in the justice of the United States, respecting their interests, they shall have the right to send a deputy of their choice, whenever they think fit, to Congress.'

"*In the treaty with the Choctaws, of September, 1830, they requested the privilege of having a delegate in the House of Representatives;* and the treaty states that 'the commissioners do not feel that they can, under a treaty stipulation, accede to the requests, but at their desire present it in the treaty, that Congress may consider of and decide the application.' " (Emphasis ours.) House Report No. 474, 23rd Congress, 1st Session, pages 21-22.

Bills similar to the 1834 effort were introduced in 1836, 1845, and 1848, but each time again failed in passage. In 1848, the then Committee on Indian Affairs held lengthy hearings and its report dated June 27, 1848, and Numbered 736, reiterated that the United States' policy was, and had been since as early as 1778, to establish a confederation of Indian tribes which would one day become a state. In this report, as in the 1834 report, the Cherokees and Choctaws were specifically mentioned. House Report No. 736 of 1848 constitutes what is probably the most revealing, while still concise, history of the United States' policy with respect both to representation of the Indians in Congress and of the creation of an Indian State, from the time of Independence to and beyond the time of the treaties here at issue, and is included in its entirety as Appendix 8 to this brief.

Nor were the Indians unaware of this long established United States' policy. The Choctaws' 1830 demand for a delegate to Congress has been referred to in the 1834 House Report. In addition, Commissioner Schermerhorn, who signed for the United States in the Treaty of New Echota, made it unmistakable to the Cherokees:

"I do not advise you to remove merely to get rid of your difficulties and the deadly influence by which

> you were surrounded, but I look forward with confidence to the day when your several tribes of Indians shall there be organized into a territorial government, with the rights and privileges of American citizens; *and that the time will yet come, when an Indian State will be added to our Federal Union;* and which, though the last, will be the brightest star and fairest stripe upon the banner of our nation, and fill up the measure of our country's glory." (Emphasis ours.) Papers and Correspondence on the Removal of Cherokees (1835-37); U. S. Department of Interior Library, E99 C5 U5.

The numerous statements made by United States representatives to the Indians, or included in the treaties or patents, quoted by Petitioners to the effect that the Indians would in their new lands never be subject to the jurisdiction of a territory or a state, can only be understood against the background of the increasingly abrasive cohabitation by (subject) Indians and (governing) whites in the *existing* Southern States prior to removal. The most attractive arguments for removal available to the United States, which sought to avoid the necessity of using force of arms, was, to the Cherokees, that their Nation would no longer be subject to the laws of the State of Georgia; and, to the Choctaws, that they would be freed from the repressive and restrictive controls of the State of Mississippi. The Indians were thus assured, and honestly so, a) that no then *existing* state would ever assert its jurisdiction over their new western lands, *and none ever has;* and b) that the Indians' lands would never be included in a new state without their consent, *and they never were,* for both Nations relinquished tribal sovereignty prior to Oklahoma statehood pursuant to formal agreements with the United States. As explained by the Court of Appeals, below:

"In 1893, Congress created a commission to negotiate with the Cherokees, the Choctaws, and other tribes for the extinguishment of the tribal titles to land, and the allotment of land to the individual members of the tribes. The result was an agreement with the Cherokees and with the Choctaws which nullified treaties inconsistent therewith and which provided for the allotment of the lands. These agreements were followed by the Act of April 26, 1906, 34 Stat. L. 137, which provided for final disposition of the affairs of the Five Civilized Tribes. This Act required that lands belonging to the tribes on their dissolution shall be held by the United States in trust for the use and benefit of the Indians." Joint Appendix 131a, 136a.

In this connection, The Cherokee Nation urges that simply because the New Echota Treaty declared that the Cherokee lands would never be included in any state or territory without the consent of the Cherokee Nation, the possibility of a future state was *ipso facto* legally precluded insofar as the applicability of the "equal footing" doctrine is concerned. The Choctaw and Chickasaw Nations make the same argument based on language in the Treaty of Dancing Rabbit Creek, which stated more simply that Choctaw land would never be embraced in any territory or state, but which was obviously equally susceptible to later amendment by agreement of the Indians whether it said so or not. These arguments entirely miss the point: *no new state ever has, or ever can be admitted to the Union without the consent of the people who seek admission.*

Under Article IV, Section 3, Clause 1, of the United States Constitution, the power of Congress is limited to the admission, not the formation, of new states. The customary

procedure has been the submission to Congress of a constitution agreed to by the people of the territory seeking admission, frequently in pursuance of prior congressional authorization in the form of an enabling act, and congressional assent to the proposals therein received from the applying territory. In other words, the consent of the people in the territory obtained through majority vote has always been required for admission of the new state, and language reflecting the necessity of such consent in the case of the Indian territories can hardly be used as evidence that the United States intended that no future state would ever, under any circumstances, there be created.

But apart from the clearly perceived possibility of a future Indian state, and equally consistent with all statements made to, all treaties made with, and all patents granted the Indians, another contingency was provided for, which if it occurred, would wholly eliminate the Indians' possessory title to the treaty lands which would then revert to their original status: *the grants to both Nations were conditional,* reflecting the obvious expectation of the United States that the establishment of the respective Indian Nations in their new locations might be merely temporary.

The Choctaw patent begins:

> "The United States under a grant specially to be made by the President of the United States shall cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River in fee simple, to them and their descendants, *to inure to them while they shall exist as a nation and live on it . . .*" (Emphasis ours.) Our Appendix 5.

Similarly, the Cherokee patent concludes:

"TO HAVE AND TO HOLD THE SAME, together with all the rights, privileges and appurtenances thereunto belonging, to the said CHEROKEE NATION FOREVER, subject . . . and subject also to the condition provided by the Act of Congress of the 28th of May, 1830, referred to in the above recited third article, and which condition is that *the lands hereby granted shall revert to the United States if the Cherokee Nation ceases and abandons the same . . .*" (Emphasis ours.) Our Appendix 9.

Thus, on the face of the grants it is apparent that the United States retained residual title to all lands granted and that it consequently cannot be said *as a matter of law*, that the treaties and grants taken together conclusively preclude the possibility that future states were contemplated in the territories conveyed to the Indian Nations. This being so, the "implied trust-equal footing" doctrine enunciated in *Pollard* v. *Hagan* and elaborated in *Shively* v. *Bowlby* is just as applicable to the lands which later became the State of Oklahoma as it was, in *Holt State Bank*, to those from which the State of Minnesota was formed.

Finally, it is with respect to what really is the main thrust of Petitioners' argument—that (their interpretation of) the treaties and patents involved here preclude the possibility of a future state *as a matter of law*—that it becomes necessary to take a realistic look at the status of the "treaties" as obligations of the United States, and at the status of the Cherokees and the Choctaws as autonomous political bodies.

First, "Such treaties are not contracts and confer no vested rights upon the tribes which are within the protec-

tion of the Constitution. They are effective not as treaties, but as acts of Congress and do not impair the power of Congress to further legislate on the same subject matter, even in violation of the terms of the treaties. Whatever may be the moral obligation to keep inviolate the treaties entered into with the Indian tribes, the sovereignty of the United States cannot be concluded by its own legislative enactments, should occasion arise for the further exercise of its authority (citing, *inter alia*, *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 47 L.Ed. 299 (1902)." Mills, Oklahoma Indian Land Laws, Thomas Law Book Co., 2d Ed., 1924, Ch. II, Sec. 6, p. 16. We include as our Appendix 10 a copy of Chapter 2 of this highly respected authority which places a suitable perspective on the legal status of the treaties cited by Petitioners.

Second, neither the Cherokees nor the Choctaws have full legal autonomy and their status has a most limited and restricted nature. They have been described by the United States Supreme Court not as "foreign nations," but as "domestic dependent nations . . . (whose) relation to the United States resembles that of a ward to his guardian." *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 8 L.Ed. 296 (1831). See also Federal Indian Law, United States Department of the Interior, 1958, Chapter VI, Section B, "The Legal Status of Indian Tribes," pages 454, *et seq.*

For these reasons, whatever the language utilized, it cannot be doubted that the United States always had the *power* to establish a future state which included the Indian lands, and that the United States, and the Indians, also, well knew this power existed.

This power was, in fact, discussed directly with the Cherokees during the treaty negotiations. In a letter from Elias Boudinot to John Ross, Chief of the Cherokees, dated November 25, 1836, Boudinot stated:

> "According to the treaty, in no future time is a territorial government to be formed over these lands without the consent of the Cherokees. From these plain provisions you build an argument to show that the Indian title is subject, not only to Act of May, 1830, and to similar acts, but to other acts which may hereafter be made, and that if the government should see fit to organize a territory over the Cherokee country, the nation will become legally extinct, and the lands will revert to the United States and hence the title pretended to be given in the treaty is good for nothing. *This no doubt is conclusive reasoning from the premises.*" (Emphasis ours.) Senate Document No. 281, 52nd Congress, 1st Session.

As noted earlier, this acknowledged power was never exercised, the agreement of both Petitioners to tribal dissolution having been obtained prior to Oklahoma statehood, but it was always there, and it is enough alone to negate any contention that the possibility of a future state was legally precluded by the instant treaties and patents upon their execution.

It is obvious, on the contrary, that in any of four clearly foreseen situations it was understood both by the United States and by the Indians that the treaty lands might be included in a future state:

1. With the consent of the Indians (which in fact occurred); or,
2. Following the abandonment of the treaty lands by the Indians; or,

3. Following the extinction of the Indian Nations; or,

4. Upon exercise of the abrogative powers of the United States vis-a-vis its "domestic dependent wards."

When it is remembered that the "implied trust-equal footing" doctrine was not a mere presumption of law established in 1845, but had been, as this Court in Pollard v. Hagen stated in that year, the consistent policy of the United States since Independence, the retention of title by the United States to the already valuable, and potentially invaluable Arkansas river bed, in the total absence of any "public exigency" requiring its divestiture, was consequently not only consonant with the then United States policy but dictated by it. The fact of retention is manifest by the absence of any language, in any instrument, in which an intention to divest ". . . was definitely declared or otherwise made very plain."

CONCLUSION

In our argument we have demonstrated that:

1. The State of Oklahoma acquired title to the bed of the navigable portions of the Arkansas River when it became a State in 1907.

The United States acquired the area that became Oklahoma as a part of the Louisiana Purchase in 1803, and with respect to that area the United States has consistently maintained its general policy of retaining title to the navigable river beds for the benefit of future States. When Oklahoma was admitted as a State it was admitted on an

equal footing with the original States and acquired title to the Arkansas river bed between its confluence with the Grand River and the State line of Arkansas. The United States did not convey this portion of the Arkansas river bed to the Cherokees or to the Choctaws in the treaties with them or the patents to them. Since there was no plain or definite conveyance to either of them, there was no need for the United States expressly to reserve the river bed. The fact that part of the navigable portion of the river ran through lands conveyed to the Cherokees and the remainder lay between the lands conveyed to the Cherokees and to the Choctaws was not material in view of the fact that the United States did not definitely and expressly convey it to either of them.

2. Neither the treaties nor the patents provide for the conveyance of the Arkansas river bed to the Cherokees or to the Choctaws. The river is mentioned in these documents only as a boundary, a monument, or a reference point.

3. The Arkansas River was important to the United States because it was a vital public thoroughfare to and through these Indian treaty lands to other portions of the Louisiana Purchase; because of its potential mineral deposits; because it was a boundary between the Cherokees and Choctaws upon which the United States was bound to maintain the peace and regulate commerce; and because it served as the principal lifeline to the United States' major military garrison in Indian Territory. In the total absence of any demand for the river by either the Cherokees or the Choctaws, it is beyond reason to suppose that the United States would have voluntarily divested itself of title to this critical navigable stream.

4. No conveyance of the river bed may be inferred from the facts. Assuming, *arguendo*, however, that some relevance may be attributed to the provisions in the treaties that the lands ceded to Petitioners were not to be included in a future State without their consent, these provisions must then be construed both in view of the then policy of the United States, and the unquestionable power of the United States to include the lands ceded to Petitioners in a State at some time in the future. Moreover, prior to admission of Oklahoma as a State, the United States secured the consent of Petitioners to relinquishment of tribal ownership of the lands and to allotment of the lands to the individual tribal members and to United States Citizenship for the tribal members. As citizens they voted on the question of admission of Oklahoma to the Union.

The judgment of the Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

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SEPTEMBER, 1969

APPENDIX

APPENDIX 1 Letter dated August 12, 1803, from President Jefferson to John Breckenridge, State Papers and Correspondence bearing upon the Purchase of the Territory of Louisiana, Pages 233-235, inclusive.

probability of success, which continued to increase till the object was accomplished.

It cannot be doubted that there were a variety of causes, which contributed to produce a change in the mind of the first Consul relative to Louisiana, & to facilitate the cession which I flatter myself our government has been fortunate in obtaining. Among these may be calculated the failure of the Expedition to St. Domingo, the pressure of the crisis in Europe &c. There are occasions which it is fair and honorable for every government to take advantage of & which none fail to do, when those at their head have discernment enough to see them. They are such as our distance from Europe, & fortunate situation in other respects, will I hope always furnish us, when they may be necessary. I affirm, however, with perfect confidence in the opinion, that notwithstanding these favorable circumstances, we should not have succeeded had the amiable relations between America & France been broken, or had the President have taken an attitude of menace towards that power, or any other than precisely that which he did take.

Extract of a letter from James Monroe, esq., Minister Plenipotentiary, London, to the Secretary of State.

AUGUST 15, 1803.

The enclosed, which I received last night from Paris by an American gentleman, containing important information, is, therefore, transmitted to you.

[Extract of a letter from Mr. Pemwick to Mr. Monroe.]

PARIS, *August 5, 1803.*

Since you left this city nothing very material has transpired. I know, however, from a faithful source, that the Spanish Government has made the most serious remonstrances against the cession of Louisiana, and their instructions here are to prevent its being carried into execution, if yet possible: and if pecuniary arguments could succeed, the hands of their Ministers are not tied on that score. This might be a useful hint, if our Senate should not disregard federal examples in modifying treaties, as it is now well understood, that, if any conditional clause of ratification should be introduced by the United States, this Government would profit of the circumstance to annul the whole work.

President Jefferson to Mr. Breckenridge.

MONTICELLO, *August 12, 1803.*

DEAR SIR,—The enclosed letter, though directed to you, was intended to me also, and was left open with a request, that when forwarded, I

would forward it to you. It gives me occasion to write a word to you on the subject of Louisiana, which being a new one, an interchange of sentiments may produce correct ideas before we are to act on them.

Our information as to the country is very incomplete; we have taken measures to obtain it full as to the settled part, which I hope to receive in time for Congress. The boundaries, which I deem not admitting question, are the high lands on the western side of the Mississippi enclosing all its waters, the Missouri of course, and terminating in the line drawn from the northwestern point of the Lake of the Woods to the nearest source of the Mississippi, as lately settled between Great Britain and the United States. We have some claims, to extend on the seacoast westwardly to the Rio Norte or Bravo, and better, to go eastwardly to the Rio Perdido, between Mobile and Pensacola, the ancient boundary of Louisiana. These claims will be a subject of negotiation with Spain, and if, as soon as she is at war, we push them strongly with one hand, holding out a price in the other, we shall certainly obtain the Floridas, and all in good time. In the meanwhile, without waiting for permission, we shall enter into the exercise of the natural right we have always insisted on with Spain, to-wit, that of a nation holding the upper part of streams, having a right of innocent passage through them to the ocean. We shall prepare her to see us practice on this, and she will not oppose it by force.

Objections are raising to the eastward against the vast extent of our boundaries, and propositions are made to exchange Louisiana, or a part of it, for the Floridas. But, as I have said, we shall get the Floridas without, and I would not give one inch of the waters of the Mississippi to any nation, because I see in a light very important to our peace the exclusive right to its navigation, and the admission of no nation into it, but as into the Potomac or Delaware, with our consent and under our police. These federalists see in this acquisition the formation of a new confederacy, embracing all the waters of the Mississippi, on both sides of it, and a separation of its eastern waters from us. These combinations depend on so many circumstances which we can not foresee, that I place little reliance on them. We have seldom seen neighborhood produce affection among nations. The reverse is almost the universal truth. Besides, if it should become the great interest of those nations to separate from this, if their happiness should depend on it so strongly as to induce them to go through that convulsion, why should the Atlantic States dread it? But especially why should we, their present inhabitants, take side in such a question? When I view the Atlantic States, procuring for those on the eastern waters of the Mississippi friendly instead of hostile neighbors on its western waters, I do not view it as an Englishman would the procuring future blessings for the French nation, with whom he has no relations of blood or affection. The future inhabitants of the Atlantic and Mis-

sissippi States will be our sons. We leave them in distinct but bordering establishments. We think we see their happiness in their union, and we wish it. Events may prove it otherwise; and if they see their interest in separation, why should we take side with our Atlantic rather than our Mississippi descendants? It is the elder and the younger son differing. God bless them both, and keep them in union, if it be for their good, but separate them, if it be better. The inhabited part of Louisiana, from Point Coupée to the sea, will of course be immediately a territorial government, and soon a State. But above that, the best use we can make of the country for some time, will be to give establishments in it to the Indians on the east side of the Mississippi, in exchange for their present country, and open land offices in the last, and thus make this acquisition the means of filling up the eastern side, instead of drawing off its population. When we shall be full on this side, we may lay off a range of States on the western bank from the head to the mouth, and so, range after range, advancing compactly as we multiply.

This treaty must of course be laid before both Houses, because both have important functions to exercise respecting it. They, I presume, will see their duty to their country in ratifying and paying for it, so as to secure a good which would otherwise probably be never again in their power. But I suppose they must then appeal to *the nation* for an additional article to the Constitution, approving and confirming an act which the nation had not previously authorized. The Constitution has made no provision for our holding foreign territory, still less for incorporating foreign nations into our Union. The executive in seizing the fugitive occurrence which so much advances the good of their country, have done an act beyond the Constitution. The Legislature in casting behind them metaphysical subtleties, and risking themselves like faithful servants, must ratify and pay for it, and throw themselves on their country for doing for them unauthorized, what we know they would have done for themselves had they been in a situation to do it. It is the case of a guardian investing the money of his ward in purchasing an important adjacent territory: and saying to him when of age, I did this for your good; I pretend to no right to bind you: you may disavow me, and I must get out of the scrape as I can: I thought it my duty to risk myself for you. But we shall not be disavowed by the nation, and their act of indemnity will confirm and not weaken the Constitution, by more strongly marking out its lines.

[Extract.]

President Jefferson to Mr. Madison.

MONTICELLO, *August 25, 1803.*

I suppose Monroe will touch on the limits of Louisiana only incidentally, inasmuch as its extension to Perdido curtails Florida, and

APPENDIX 2 Letter dated March 26, 1908, from C. F. Larrabee, Acing Commissioner of Indian Affairs, to the Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,

I.T. 20634-1908. OFFICE OF INDIAN AFFAIRS,

WASHINGTON.

RHM-

Subject:
Purchase of sand and gravel by Lowerre Rucker Company from bed of Arkansas River.

The Honorable,

The Secretary of the Interior.

Sir:

I have the honor to invite your attention to the enclosed letter of March 2 from J. G. Wright, Commissioner of the Five Civilized Tribes, submitting communication of the 13 from the United States Indian Agent, Union Agency, relative to an application made on August 30, 1907, by the Lowerre Company for permission to enter into a contract for the of sand and gravel from the Arkansas River of the of the Cherokee Nation. Mr. Wright quotes the re porting that a representative of the Lowerre Rucker called at his office and said that practically no gravel been taken out of the river prior to November when the Indian Territory became incorporated as a part State of Oklahoma, that it was the opinion of that the title to the bed of the river had passed from the Cherokee Nation to the State of Oklahoma, and for this reason the company did not think it proper to enter into contract to pay royalties to the Cherokee

- 2 -

from a river situated in the State of Oklahoma.

The Commissioner says that there are in existence other contracts for the taking of sand and gravel from the Arkansas River, which the War Department has held to be a navigable stream, and that all the parties to such contracts are contending that from and after November 16, 1907, when Indian Territory became a part of the State of Oklahoma, neither the Cherokee Nation nor the Department of the Interior had further jurisdiction in the matter, and that they should be required to pay royalty on sand and gravel taken from the bed of any navigable stream. Commissioner Wright asks for instructions.

In the case of Shively vs. Bowlby (152 U. S. 1) the Supreme Court very thoroughly discusses the question of [illegible] title to and rights from certain of its grants [illegible]

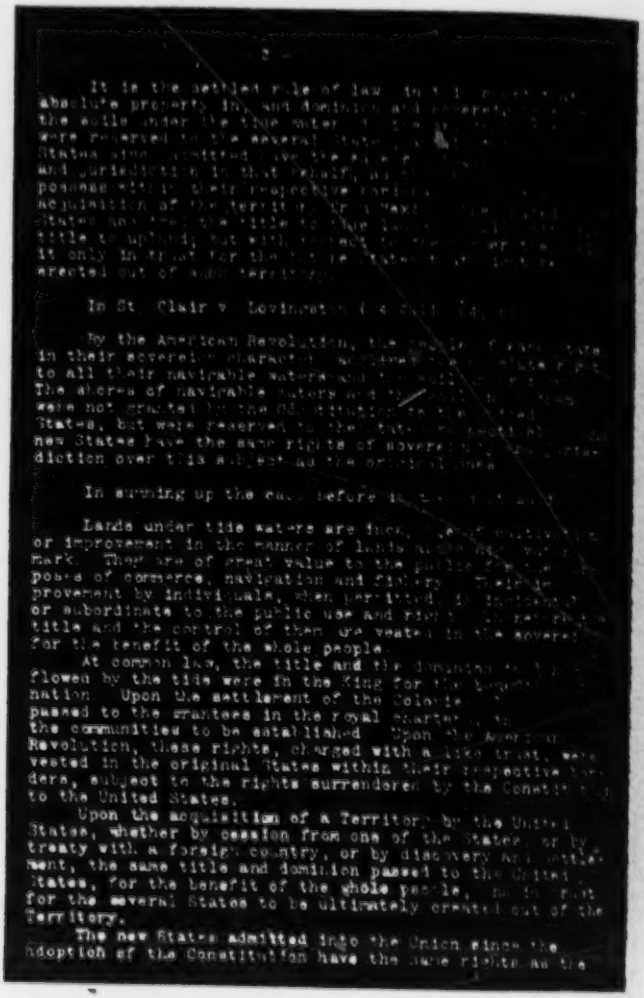
The following is cited:

In the case of Weber v. Harbor Commissioners (18 Wall [illegible] involving the question of ownership of lands below [illegible] Francisco:

Although the title to the soil under the tide waters within the boundaries of the United States is vested in the several States, subject to the title to the soil, the title in trust for the future States. Upon the admission of California into the Union upon equal footing with the original States, absolute property in, and dominion and sovereignty over, all soils under the tide waters within her limits passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner as the State may deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation may be affected by the laws of commerce with foreign nations or among the several States, the regulation of which was vested in the general government."

The case of Knight v. United States Land Association, (142 U. S. 183).

[APPENDIX]



It is the settled rule of law in t[illegible] absolute property in, and dominion and [illegible] the soils under the tide waters [illegible] were reserved to the several [illegible] States since admitted have the same [illegible] and jurisdiction in that behalf, and [illegible] possess within their respective [illegible] acquisition of the territory [illegible] States and to the title to [illegible] title to uphold, but with regard [illegible] it only in trust for the future States [illegible] erected out of such territory.

In St. Clair v. Lovingston ([illegible]

By the American Revolution, the [illegible] State in their sovereign character, acquired [illegible] to all their navigable waters and [illegible] The shores of navigable waters and [illegible] were not granted by the Constitution [illegible] States, but were reserved to the States respectively. The new States have the same rights of sovereignty [illegible] diction over this subject as the original [illegible]

In summing up the cases before [illegible]

Lands under tide waters are [illegible] or improvement in the manner of lands above high water mark. They are of great value to the public for the purposes of commerce, navigation and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. The ultimate title and the control of them are vested in the sovereign for the benefit of the whole people.

At common law, the title and the dominion [illegible] flowed by the tide were in the King for the benefit of the nation. Upon the settlement of the Colonies [illegible] passed to the grantees in the royal charters [illegible] the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution to the United States.

Upon the acquisition of a Territory by the United States, whether by cession from one of the states, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several States to be ultimately created out of the Territory.

The new States admitted into the Union since the adoption of the Constitution have the same rights as the

original States in the tide waters, and in [illegible]
them, or in their respective jurisdictions [illegible]
and rights of riparian or littoral proprietors in the soil
below high water mark, therefore, are governed by the laws
of the several States, subject to the rights granted to
the United States by the Constitution.

The United States, while they hold the country as a
Territory, having all the powers both of national and of
municipal government, may grant, for appropriate purposes,
titles or rights in the soil below high water mark of tide
waters. But they have never done so by general laws; and,
unless in some case of international duty or public exigency
have acted upon the policy, as well as the principle, that the
interest of the people and the object for which the
Territories were acquired, of leaving the determination
and disposition of the sovereign rights in navigable
waters, and in the soil under them, to the control of the
States, respectively, when organized and admitted into the
Union.

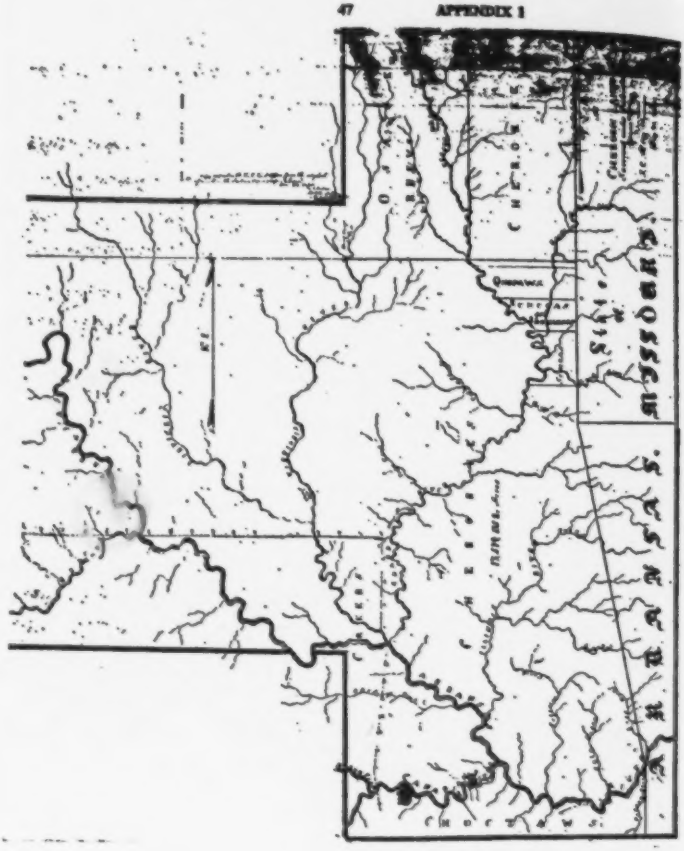
The Arkansas River throughout its length in the
Cherokee Nation is a navigable stream under the laws of the
United States.

Under the above-quoted holding of the court, it must
be conceded that when the State of Oklahoma was created, its
jurisdiction and ownership of the lands below high water mark
of all navigable streams within its boundaries, became vested in
in other words, when the United States conveyed by warranty deed
the land occupied by the Cherokees, Creeks, Choctaws, Chickasaws
and Seminoles, it did not convey the ownership of the beds of
navigable streams but reserved them for the benefit of the
future state within whose boundaries they would fall. Thus, the
State of Oklahoma, on its creation, became absolute owner of the
bed of the Arkansas River, and the Cherokee Nation is not en-
titled to royalty for any sand or gravel taken from the bed of
that river since November 16, 1907.

March 27, 1909. Very respectfully,

APPROVED: [signature] Secretary. [signature] Acting Commissioner

APPENDIX 3 Plat of Survey of Cherokee lands dated September 20, 1837, made under instructions from Isaac McCoy.



APPENDIX 4 Field notes dated September 19, 1831, of the Survey of the Cherokee line from the southwest corner of Missouri to Fort Smith on the Arkansas River.

Rec'd in the Gen'l Land Office, Comr. dated 6 Nov 1839, 1839. 1
Sup p 239

407 (No 3)

Field notes of the Survey of the Cherokee line from the South West corner of Missouri to Fort Smith on the Arkansas River.

September 19. 1831. Pursuant to instructions furnished, commenced at the South West corner of Missouri and proceeded South 35° East, the line crossed in a direct line to Fort Smith.

Magnetic variation, by the Compass was, N 15° E. 4 poles allowed. Distances and courses from the beginning of Each mile.

All trees on the line marked with a Hatchet and blazed, and a chip above and below, those marked on both sides of it, marked with a Hatchet, facing the line

No.	Bearing
1	S 35° E. Line headed near Hog. Thence over and through Timber. Pr. on Creek, set a stone post with stones, S 35° E 80 Links on line, marked B.T. 1 M., N 55° E 60 Links on line marked Cor. 1 M.
2.	Crossed creek, bank, open, inclined. Post oak 12 in. N. on Ch, set a stone from which, N 15° E 2 Links on line, marked B.T. 2 M., N 35° E 25 Links on line marked Cor. 2 M.
3	N. on Ch, to a Ravine, first water, bank land. N. on Ch, set a stone, near a pond of water. N. on Ch, set a stone. N. on Ch. set a stone.
4	N. on Ch, set a stone N. on Ch, set a stone N. on Ch, set a stone. N. on Ch, set a stone.
5	N. on Ch, to timber. Ravine, bank and bank land. Pr. to on timber Ravine, bank and bank land. N. on set a stone from which, N 35° E 80 Links on Ch, on line marked B.T. 5 M., N 55° E 60 Links on Ch, a pond marked Cor. 5 M.
6.	N. on Ch, on timber, first water and Ravine, pond land. N. on set a stone from which, S 35° E 80 Links on line marked B.T. 6 M., N 55° E 60 Links on line marked Cor. 6 M.

(24)

[APPENDIX]

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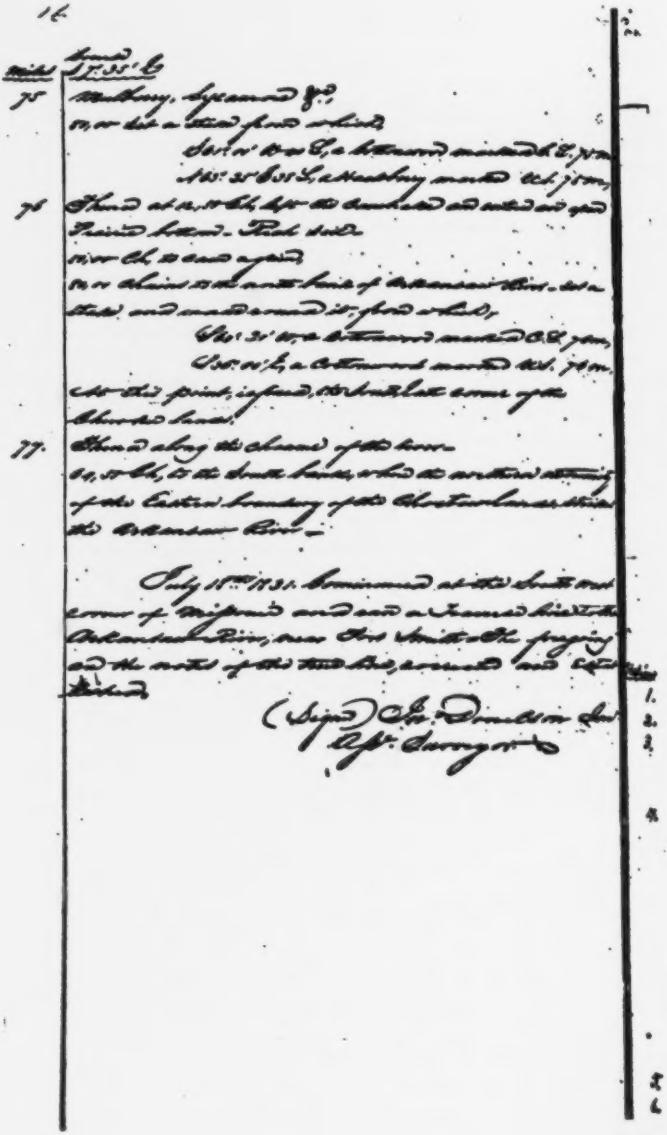


APPENDIX 5—Patent issued to Choctaws, dated March 23, 1842.

THE UNITED STATES OF AMERICA,

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS, by the second Article of the Treaty began and held at Dancing Rabbit Creek, on the fifteenth day of September, in the year of our Lord one thousand eight hundred and thirty, (as ratified by the Senate of the United States, on the 24th February, 1831) by the Commissioners on the part of the United States, and the Mingoes, Chiefs, Captains, and Warriors, of the Choctaw Nation, on the part of said Nation, it is provided that "The United States under a grant specially to be made by the President of the U. S. shall cause to be conveyed to the Choctaw Nation a tract of Country West of the Mississippi river, in fee simple, to them and their descendants, to inure to them while they shall exist as a Nation and live on it:—Beginning near fort Smith where the Arkansas boundary crosses the Arkansas river, running thence to the source of the Canadian fork, if in the limits of the United States, or to those limits; thence due South to Red river, and down Red river to the West boundary of the territory of Arkansas; thence North along that line to the beginning.—The boundary of the same to be agreeably to the treaty made and concluded at Washington City in the year 1825."

NOW KNOW YE, that the United States of America, in consideration of the premises, and in execution of the Agreement and stipulations in the aforesaid Treaty, Have Given and Granted, and by these Presents Do Give and Grant, unto the said Choctaw Nation, the aforesaid "tract of Country West of the Mississippi;" To Have and To Hold the same with all the rights, privileges, immunities, and appurtenances of whatsoever nature, thereunto belonging, as intended "to be conveyed" by the aforesaid Article, "in fee simple, to them and their descendants, to inure to them, while they shall exist as a nation and live on it," liable to no transfer or alienation, except to the United States, or with their consent.

IN TESTIMONY WHEREOF, I, John Tyler President of the United States of America, have caused these Letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington the twenty third day of March in the year of our Lord one thousand eight hundred and forty two, and of the Independence of the United States the sixty sixth.

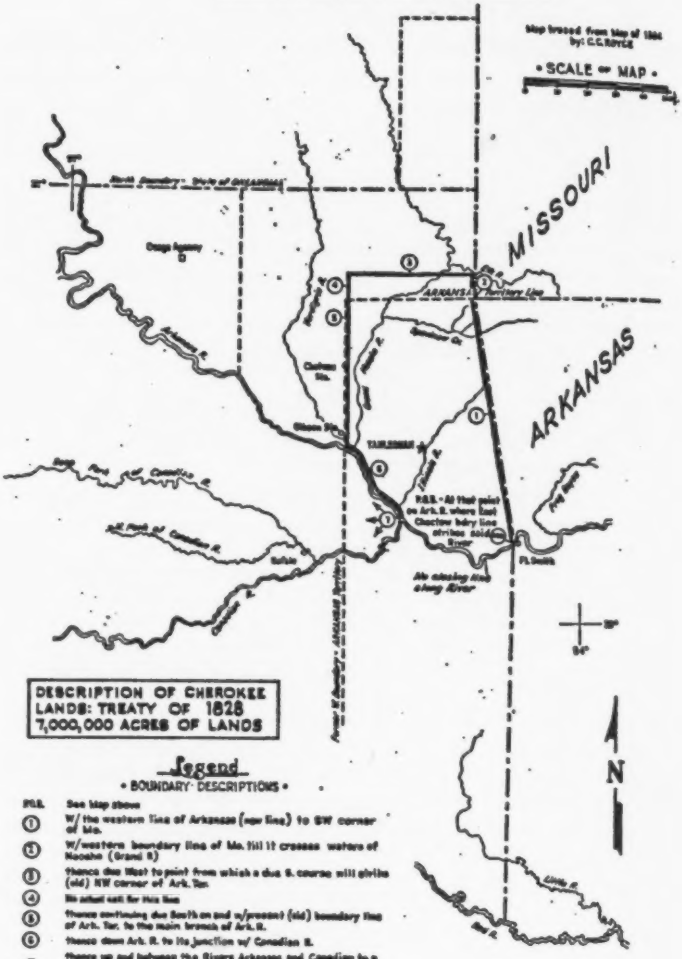
By the President, John Tyler.

Daniel Webster,
Secretary of State

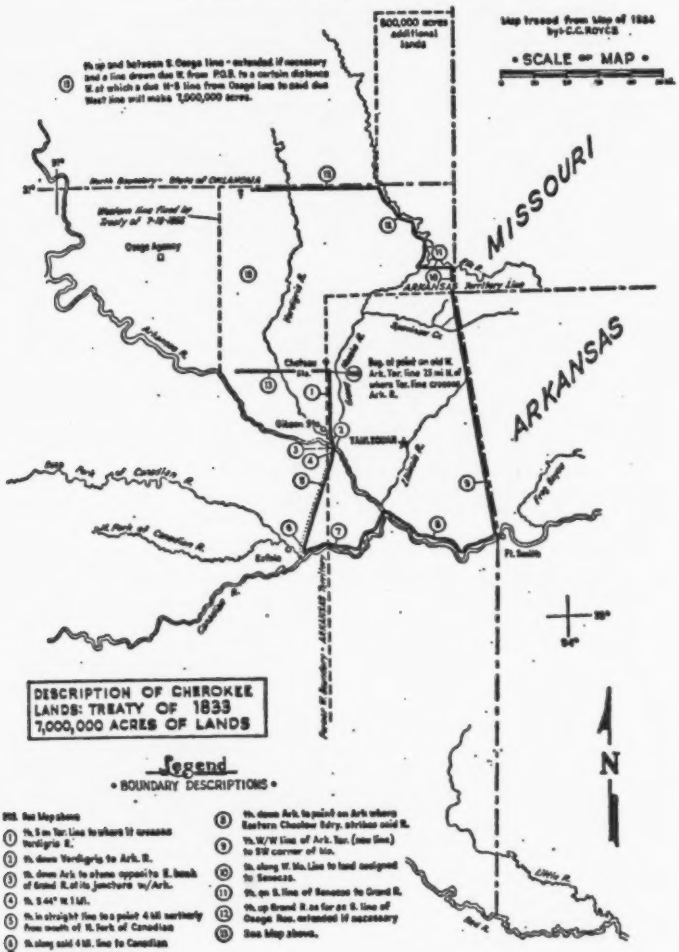
John C. Spencer
Secretary of War

T. Hartley Crawford
Commissioner of
Indian Affairs.

APPENDIX 6 Map showing Cherokee lands under 1828 treaty, traced from map by C. C. Royce dated 1884.



APPENDIX 7 Map showing Cherokee lands under 1833 treaty, traced from map by C. C. Royce dated 1884.



APPENDIX 8 Report No. 736, House of Representatives, dated June 27, 1848.

THIRTIETH CONGRESS—FIRST SESSION.

Report No. 736.

[To accompany bill H. R. No. 579.]

HOUSE OF REPRESENTATIVES.

INDIAN TERRITORY, WEST OF THE MISSISSIPPI.

JUNE 27, 1848.

Mr. McILVAINE, from the Committee on Indian Affairs, made the following

REPORT:

The Committee on Indian Affairs, to whom was referred the resolution of the House instructing the committee "to inquire into the expediency of organizing a territorial government in the Indian country west of the Mississippi, to which the Indians have been removed by the government," report:

That, from a careful examination of the subject, it appears that the policy of the government, from its foundation forward, has contemplated an organization of an Indian government or governments, in political connexion with the United States. Commencing under the confederation, as early as 1778, it has been repeated in various treaties with different tribes down to a recent date. In a treaty "of *agreement and confederation* made with the Delawares, in September, 1778," it was "further agreed on by the contracting parties, (should it, for the future, be found conducive for the interests of both parties,) to invite any other tribes who have been friends to the interests of the United States, to join the present confederation, and to form a State, whereof the Delaware nation shall be the head, and have a representative in Congress: *Provided*, nothing conthined in this article is to be considered as conclusive until it meets with the approbation of Congress."

A treaty made with the Cherokees, in 1785, provides "that the Indians may have full confidence in the justice of the United States, respecting their interests, they shall have the right to send a deputy of their choice, whenever they think fit, to Congress."

The twenty-second article of the treaty of September 30, 1830,

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with the Choctaws, declares that "the chiefs of the Choctaws, who have suggested that their people are in a state of rapid advancement in education and refinement, have expressed a solicitude that they might have the privilege of a delegate on the floor of the House of Representatives extended to them. The commissioners do not feel that they can, under a treaty stipulation, accede to the request, but, at their desire, present it in the treaty that Congress may consider of, and decide the application."

The increase of the white population of the country, and the encroachments of their settlements upon the Indian lands, the desire on the one hand to obtain the valuable possessions of the Indians, and on the other to get rid of, and in future avoid collision with, and the injurious influences of the proximity of, the whites; to enjoy in their own way their own freedom of government, without any other interference than that which good fellowship imposes, and to relieve the States of the embarrassment of independent Indian governments within their midst; in a word, to collect together the various Indian tribes which were scattered over many of the States of the Union, in a country free from territorial or State government, and to secure to them permanently the possession of their property, the freedom of government, their advancement in civilization, and eventual political connexion with the States, led to treaties with the various Indian tribes which inhabited the States, for the cession of their lands and their removal to a territory west of the Mississippi, and which, by these treaties, was secured to them and their descendants forever.

The first step in this work, which, however, had not then assumed the character of a system, but which led to the very promising results that followed; a step, induced as it were, by the GREAT SPIRIT, by which, through a few of the most ignorant of these then ignorant people, a plan of deliverance, of protection, of civilization, of christianization, was taken in the fall of 1808. A proposition was then made by a portion of the Cherokee tribe "to remove across the Mississippi river on some vacant lands of the United States," (in consequence of "the scarcity of game where they then lived,") there to continue *the hunter life*." The President, in reply to this petition, in January following, said that "those who wish to remove, are permitted to send an exploring party to reconnoitre the country on the waters of the Arkansas and White rivers, and the higher up the better, as they will be the longer unapproached by our settlements, which will begin at the mouths of the rivers."

"When this party shall have found a tract of country suiting the emigrants, and not claimed by other Indians, we will arrange with them and you the exchange of that for a just portion of the country they leave, and to a part of which, proportioned to their numbers, they have a right."

Accordingly, in July, 1817, (the Indians above referred to having explored "the country on the west side of the Mississippi, and made choice of the country on the Arkansas and White rivers, and settled themselves down upon United States' lands, to which no

other tribe of Indians have any just claim,") a treaty was concluded with the Cherokee nation, by which they ceded to the United States the proportion of their land to which the emigrated Indians were entitled, for which they received an equal amount of land west of the Mississippi. But this location did not long remain "unapproached by our settlements," and a second treaty was made with the tribe in 1828, the preamble of which reads: "Whereas, it being the anxious desire of the government of the United States to secure to the Cherokee nation of Indians, as well those now living within the limits of the territory of Arkansas as those of their friends and brothers who reside in States east of the Mississippi, and who may wish to join their brothers of the West, a *permanent* home, and which shall, under the most solemn guarantee of the United States, be and remain theirs forever—a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a territory or State, nor be pressed upon by the extension, in any way, of any of the limits of any existing territory or State."

By the second article of the treaty, "the United States agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee is hereby solemnly pledged, of seven millions of acres of land," west of Arkansas and Missouri, with an outlet west, "as far as the sovereignty of the United States and their right of soil extend." Another treaty was made with the Cherokees in 1835, by which they ceded to the United States all their remaining lands east of the Mississippi, and agreed to remove, with certain exceptions, to the country provided for them west.

In like manner the removal of another powerful tribe, the Choctaws, commenced in 1820, by exchanging for a small part of their land a country "beyond the Mississippi river, *where all who live by hunting, and will not work, may be collected together.*" This *selvage* of the tribe, separated from it, as expressed in the treaty, "to promote the civilization of the *east* Choctaw Indians by the establishment of schools among them," as with the Cherokees, became the nucleus about which the body of the nation gathered, "having far outstripped those they left behind in the arts of civilization and in the comforts of life." Of them it may be truly said: "The stone which the builders rejected, the same is become the head of the corner."

President Monroe, in his message to Congress in 1825, urged, as the best means of preserving and civilizing the Indian tribes, the policy of removal, by the acquisition from the native Indians of "a sufficient tract of country west of the State of Missouri and the Territory of Arkansas, in order to establish permanent settlements in that quarter of the tribes which were proposed to be removed." And Mr. Calhoun, then Secretary of War, in his report, recommended that "the strongest and most solemn assurances" should be given "that the country given them should be theirs as a permanent home for themselves and their posterity, without being disturbed by the encroachments of our citizens;" and, "to add to such assurances a system by which the government, without destroying

their independence, would gradually unite the several tribes under a simple but enlightened system of government and laws."

This recommendation of President Monroe was again pressed upon the notice of Congress by President Jackson in his annual message of December, 1829, who recommends the removal of the Indians from the States, and adds, "as a means of effecting this end, I suggest for your consideration the propriety of setting apart an ample district, west of the Mississippi, and without the limits of any State or territory now formed, to be guarantied to the Indian tribes as long as they shall occupy it; each tribe having a distinct control over the portion designed for its use. There they may be secured in governments of their own choice, subject to no other control from the United States than such as may be necessary to preserve peace on the frontier and between the several tribes. There the benevolent may endeavor to teach them the arts of civilization, and, by promoting union and harmony among them, to raise up an interesting commonwealth, destined to perpetuate the race, and to attest the humanity and justice of this government."

On the 30th May following, an act was passed, in pursuance of this recommendation of President Jackson, providing for an exchange of lands with the Indians residing in any of the States or territories, and their removal west of the Mississippi. It also provides that, "in the making of any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guaranty to them, their heirs, or successors, the country so exchanged with them; and, if they prefer it, the United States will cause a patent or grant to be made and executed to them for the same: *Provided always*, That such lands shall revert to the United States if the Indians become extinct or abandon the same."

This act, adding to the executive recommendation the sanction of the legislative branch of the government, perfected a system of exchange, removal and guaranty, and pledged the national honor to its faithful observance.

Various treaties have since been made with the different tribes inhabiting the States, by which all of them have been removed or are in a state of removal. The first of these was made with the Choctaws, in September of the same year, by which they agree to "cede to the United States the entire country they own east of the Mississippi river," and to remove beyond it "as early as practicable." In consideration of which the United States promise to "cause to be conveyed to the Choctaw nation a tract of country west of the Mississippi river, in fee simple to them and their descendants, to enure to them while they shall exist as a nation and live on it, beginning," &c. It further provides that "the government and people of the United States are hereby obliged to secure to the said Choctaw nation of red people the jurisdiction and government of all the persons and property that may be within their limits west, so that no territory or State shall ever have a right to pass laws for the government of the Choctaw nation of red peo-

ple and their descendants; and that no part of the land granted them shall ever be embraced in any territory or State; but the United States shall forever secure said Choctaw nation from and against all laws except such as from time to time may be enacted in their own national councils, not inconsistent with the constitution, treaties and laws of the United States; and except such as may, and which have been enacted by Congress, to the extent that Congress, under the constitution, are required to exercise a legislation over Indian affairs. But the Choctaws, should this treaty be ratified, express a wish that Congress may grant to the Choctaws the right of punishing, by their own laws, any white man who shall come into their nation, and infringe any of their national regulations."

A treaty of similar import was concluded, in February, 1831, with the Seneca Indians of Ohio, "for the removal and permanent settlement of said tribe" west of the Mississippi; and the government agreed to "grant them, by patent, in fee simple, as long as they shall exist as a nation, and remain on the same, a tract of land, situate," &c., "for which the President of the United States shall cause letters patent to be issued, in due form of law, agreeably to the act of the last session of Congress."

Similar treaties were made with several other tribes, in the same year; and, in March, 1832, a treaty was concluded with the Creeks by which the tribe ceded to the United States "all their land east of the Mississippi river," having previously exchanged a portion of their lands for others west. This treaty provides that "the Creek country west of the Mississippi shall be solemnly guarantied to the Creek Indians; nor shall any State or territory ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves so far as may be compatible with the general jurisdiction which Congress may think proper to exercise over them. And the United States will also defend them from the unjust hostilities of other Indians, and will also, as soon as the boundaries of the Creek country west of the Mississippi are ascertained, cause a patent or grant to be executed to the Creek tribe, agreeably to the act of Congress of May, 1830."

In the treaty of 1835 with the Cherokees, already referred to, the United States "covenant and agree that the lands ceded to the Cherokee nation in the foregoing article shall, in no future time, without their consent, be included within the territorial limits or jurisdiction of any State or territory. But they shall secure to the Cherokee nation the right, by their national councils, to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country, belonging to their own people, or such persons as have connected themselves with them; provided, always, that they shall not be inconsistent with the constitution of the United States, and such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians; and, also, that they shall not be considered as extending to such citizens, and army of the United States, as may travel or reside in the Indian country,

by permission, according to the laws and regulations established by the government of the same."

In this treaty, the pledge which had, theretofore, been given to them, that they should have a delegate in Congress, was repeated to them. The 7th article says: "The Cherokee nation, having already made great progress in civilization, and deeming it important that every proper and laudable inducement should be offered to their people to improve their condition, as well as to guard and secure, in the most effectual manner, the rights guarantied to them in this treaty, and with a view to illustrate the liberal and enlarged policy of the government of the United States towards the Indians, in their removal beyond the territorial limits of the States, it is stipulated that they shall be entitled to a delegate in the House of Representatives of the United States, whenever Congress shall make provision for the same."

From the foregoing, it will be seen that the advantages obtained and promised by the United States, and the Indian tribes which inhabited the States, were reciprocal; the United States liquidating the Indian title to all lands within the States, and removing the occupants to a country free from State or territorial jurisdiction; the Indians freeing themselves from the inconvenience, and, in some instances, oppression of State jurisdiction, the injurious contamination of a proximity with the whites, and receiving the guaranty of the government for the permanency of their possessions, the independence of their government, and their ultimate admission to political equality with citizens of the United States.

The benefits resulting to the United States, under this policy, have been fully enjoyed; and it remains for this government to carry out, in good faith, its obligations to the weaker and dependant party. So undeniable is this obligation, that your committee consider it a question of *time* rather than *principle*. Has that time arrived? Your committee believe that it has. Nor is it *now* for the first time so considered. In 1826, the Secretary of War (Mr. Barbour) recommended the organization of a territorial government over the Indian country west, and the Committee of Indian Affairs reported a bill to that effect. This bill, however, proposed a government *under the jurisdiction of the United States*, and cannot be considered in full accordance with the policy which was subsequently adopted.

The Secretary of War, Mr. Eaton, in his report submitted at the opening of the first session of the 21st Congress, (December, 1829,) remarked, in reference to the preservation of the Indian tribes, "No better plan can be thought of than that the United States shall put in operation such a system of Indian protection and government, west of Mississippi, as that a confidence may be reposed that they are, indeed, our fostered children, and the government not only so disposed to consider, but practically to evince their good feeling towards them;" and adds: "I beg leave to suggest for your consideration if an Indian territory, without the range of western States or territories, might not be advantageously created."

This subject engaged the attention of Congress in different forms until May, 1834, when the Committee on Indian Affairs, through

Mr. H. Everett, and upon the recommendation of the Executive, made a very elaborate report, accompanied by a bill providing for the organization of an *Indian territory*, securing to the Indian tribes all the rights and privileges guaranteed to them by treaty, and carrying out the oft expressed intentions of the government towards this interesting remnant of the original proprietors of the territory over which our great and glorious republic now extends.

The report sets out with this declaration: "Whatever difference of opinion may heretofore have existed, the policy of the government, in regard to the future condition of these tribes of Indians, may now be regarded as definitively settled. To induce them to remove west of the Mississippi, to a territory set apart and dedicated to their use and government forever; to secure to them there a final home; to elevate their intellectual, moral, and civil condition, and to fit them for the enjoyment of the blessings of free government, is that policy. And a further hope is now encouraged, that whenever their advancement in civilization should warrant the measure, and they desire it, that they may be admitted as a State, to become a member of the Union."

This bill failed to become a law; and in February, 1836, a new one was introduced, "to provide for the security and protection of the emigrant and other Indians west of the State of Missouri and of the Territory of Arkansas." This bill also described the boundaries of an "Indian territory," and, as the former, pledged the faith of the country to the Indians for its perpetual possession. It, too, failed to become a law.

A very full and interesting report was made to Congress at its next session, by the Commissioner of Indian Affairs, C. A. Harris, upon this subject, in which, after reviewing the action of the government in relation to these Indians, he proceeds to say: "I beg leave to observe, that the aspects, under which it now presents itself, differ materially from those in which it was submitted to Congress in 1825 and 1826. The plan of removing the Indian tribes from the States and territories was then, comparatively, in its infancy. Districts of country west of the Mississippi had been assigned to the Choctaws and Cherokees, but only a small number of either tribe had emigrated. And the views of the Executive seem to have been directed to the subject of a government for those who had gone, or might go, more as an inducement to them to remove, than as a measure immediately demanded for their protection, peace, and prosperity by any existing relations. But the act of May, 1830, gave to this matter a new character. It distinctly authorized treaties for the exchange and cession of lands, the conveyance in fee of equivalent tracts to the Indians, and the extension to them, at all times, of adequate protection. Since its passage, the current of emigration has been constantly flowing, with different degrees of rapidity at different times."

The bill last named (February, 1836) was, by direction of the Commissioner of Indian Affairs, submitted to the different tribes inhabiting the Indian country by an agent of the government, and their views taken upon the subject, after its being fully explained

to them. Most of the tribes were unanimous in their concurrence in the measure, and desired that it might "be carried into effect as soon as practicable." The Choctaws are the only tribe which appear to have dissented.

The Secretary of War, Mr. Spencer, in his report to the third session of the 27th Congress, after speaking of the inadequacy of the present system of superintendents and agents to secure the Indians against the frauds and vices of the whites who hover upon their borders, remarks: "The plan of something like a territorial government for the Indians has been suggested. The object is worthy of the most deliberate consideration of all who take an interest in the fate of this helpless race."

The subject was again brought before Congress at the session of 1845-'46, by the memorial of the "American Mission Association," and a report was made by the Committee on Indian Affairs on the 22d June. The committee, after reviewing the action of the government in relation to the Indian tribes, proceed to say: "It is sufficiently evident to the committee, from a contemplation of our existing relation with the Indian tribes referred to, resulting from the rapid growth and progress of our population, that we have approximated the point when this government must decide whether existing guarantees of treaties with those tribes shall be maintained in the spirit which dictated them; whether those guarantees are sufficient for the avowed object of providing a home for the red man forever in the country assigned him; or, whether those treaties are to be set at naught, the experiment of civilization arrested, and the red race again be driven and dispersed into the wilderness." "A feeling of distrust and alarm is getting abroad on this subject among those who have long proved themselves the sincere and disinterested friends of the Indian, and for the policy adopted for the amelioration of his social condition."

"The committee will neither assert nor deny that this feeling has any just foundation in the existing condition of our relations with the Indians. It is sufficient for their purpose that it exists, and that it paralyzes, and will, until removed, continue to paralyze the efforts of good men, having for their object the cultivation and elevation of the moral attributes of the aboriginal race.

"Impressed with such like convictions, the committee do not hesitate to express their opinion that the policy of this government, as indicated by treaties with the removing tribes, so far as relates to the integrity and inviolability of territory, ought not to be abandoned, and that the guarantees of a home by those treaties should be maintained in good faith."

The committee reported a bill defining the Indian territory, but it was not acted upon by the House.

Mr. Secretary Wilkins, in his report to the 2d session, 28th Congress, in referring to the emigrated Indians, says: "In the course of the progress under our moral enterprise, for their civilization, they must eventually obtain the sagacity to look out for individual and social rights, and that degree of general intelligence to entitle them to the full extension of all the privileges of American citi-

zens. When that time shall arrive, there will be no obstacle to political association by reason of any natural or acquired repugnance to the blood of the original American."

A report made in 1836, by the acting superintendent of Indian affairs in the western territory, Captain Wm. Armstrong, in compliance with the instructions from the commissioner, represents the condition of these emigrated Indians, at that time, highly prosperous and encouraging; a condition which the commissioner very justly remarks, "forms one of the arguments upon which the expediency of establishing a government competent to afford security and protection may be rested." The Choctaws were governed by a written constitution and laws, and had an annual general council. The chase was nearly abandoned for a living, and was pursued more as an excursion of pleasure than a source of gain. The Cherokees were far advanced in civilization. Among them were many highly intelligent men, and they had made great progress in agriculture and the mechanic arts. The Creeks and the smaller tribes had also made considerable advancement in agriculture, and they all had the means of education. Within the limits of the three larger tribes—the Choctaws, Cherokees, and Creeks—there were then seventeen churches.

The progress of civilization and improvement which, at that time, was so flatteringly described, has steadily advanced. The reports since made show that much attention has been paid to education by many of the tribes, and their example has exerted a beneficial influence over their less enlightened neighbors. The church and the school-house mark every where the march of civilization, and "the hunting path has been effaced by the ploughshare." Several of the tribes have established academies of learning, supported by their ample education funds, which would not suffer by a comparison with similar institutions of our own, and none of the tribes are without primary schools. The reports show a constant increase of scholars, male and female, and some of their best teachers of either sex are of Indian blood. The children are found to be fully as capable and ready in receiving instruction as our own race, and it were useless to add that, learned or unlearned, in peace or in war, from "Philip" down to the present day, the brighest intellect and the noblest spirit has marked the red man's fame.

The Cherokees, as well as the Choctaws, have a written constitution and laws, courts of justice, legislative council of two branches, and all the machinery of civilized government. The introduction of manual labor schools has greatly advanced the cause of education amongst the Indian tribes by uniting with ordinary instruction, the science of agriculture and the mechanic arts. The youth thus educated return to their people with a fund of *practical* knowledge, which commends them to their respect and admiration, and gives them an influence for usefulness which *letters* alone could not command. The first of these schools was introduced by the Methodist mission at Fort Leavenworth, and others have since been established amongst various tribes by the

Presbyterian, Friends, and Catholic societies. The Baptists, Moravians, and other religious and benevolent societies have done much for the improvement of these people by sending missionaries and teachers amongst them; but as civilization and education advance, these posts of instruction and usefulness are gradually filled by their own race.

Intemperance, that crowning vice of the Indian—the accursed legacy of the white man, has decreased in the ratio of their advancement in the arts of civilized life. Several of the tribes have enacted stringent prohibitory laws against its introduction, temperance societies are numerous, and in some of the tribes intoxication is said to be very rarely seen. Can we, with such a cheering history before us, longer withhold the hand of fellowship and union from a people who have such unspeakable claims upon our sympathy and protection?

Nothing, your committee believe, would so hasten the progress of civilization, and promote the improvement and happiness of these tribes, as the immediate fulfilment of the policy long and constantly indicated by the government; the integrity of their territory, independence of government, and political equality. Whatever embarrassments may have been in the way of fulfilling our treaty stipulations with a portion of these people upon former occasions, growing out of conflicting, federal, and state rights, no such impediments exist now. The Indian title to the western territory has been extinguished by the government, and Congress has the unqualified power to dispose of it as it please. A portion of it has been conveyed to the Indian tribes by treaty, and it is now proposed to perpetuate the title by patent or grants, as promised by those treaties. Your committee do not suppose that there can ever be any disposition on the part of the government to violate its plighted faith with these comparatively helpless people; but it appears that apprehensions do exist as to the inviolability of their territory, which tend to disturb their tranquility, and retard their improvement.

The committee report a bill, which is hereto annexed, embracing the general principles of the bill of 1834, with some modifications suited to the improved condition of the tribes. It describes the territory and dedicates it forever to the Indian tribes, to whom it has been or may hereafter be granted; securing to each tribe the unqualified right of self government, with jurisdiction over all persons and property within their respective limits, subject to certain exceptions founded upon established principles of international law, reserving to this government that constitutional power which it could not surrender—the regulation of trade with the Indian tribes. It also gives to the respective tribes forming the confederacy, the power of trial and punishment of all persons not belonging to the same, who may offend against their laws, subject to the approval of the governor, and in cases of capital offence the pardoning power is reserved to the President. And, for the better security of life and the promotion of peace between the several tribes, capital offences committed by a member of one tribe

upon that of another, shall be subject to the regulations of the general council. It provides for a confederation of the respective tribes inhabiting the territory, who may accede thereto, with a governor, appointed in the first place by the President, a national council, and a delegate in the House of Representatives, leaving everything which can safely and profitably be committed to them to their own management and control; and contemplating a gradual withdrawal of all agency of the government in the management of their concerns, as fast and as early as their condition and the interests of the government will permit; and, to satisfy the Indians that no undue advantage is intended to be taken by the government of the tribes entering into the confederacy, provision is made for the recession of any of them whenever they shall desire so to do.

The confederation of the several tribes, and the annual assembling of delegates of their own selection, in a common council, would be a powerful stimulant to improvement. The association upon these occasions of the more intelligent members of the different tribes, would not only diffuse knowledge and a spirit of emulation throughout the whole, but it would unite them in a common bond of amity and strength. By giving them a representative in Congress, they would feel that they were no longer considered inferiors, strangers, jealous of the encroachments of power, but part and parcel of ourselves, possessing the rights and enjoying the privileges of citizens. A vigilant guardian would be placed over the administration of their affairs, and abuses and suspicions of abuse would be prevented or removed. The present expensive system of agencies, sub-agencies, and superintendencies, might be withdrawn as they became capable of managing their own affairs; and military posts, the presence of which is represented as being fraught with mischief and discontent to the Indian, being no longer required by the hostile, or supposed hostile relation which these people bear towards us, another source of expense would thereby be removed.

With these remarks the committee submit the question to the House, confident in the hope that a subject so full of interest to the red man, whose green woods and fertile plains have been again and again yielded up to the demands of civilization, until he at last rests upon our utmost verge, whose safety, if not his existence, hangs upon it, will not fail to engage its early and favorable attention.

A BILL to provide for the organization of an Indian Territory, west of the Mississippi river.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all that part of the territory of the United States bounded on the east by the States of Arkansas and Missouri, as far north as the south bank of

the Missouri river; on the northeast by the south bank of the said Missouri river, to the mouth of the river Platte; on the north by the south bank of the said river Platte to where its north branch crosses the forty-second degree of north latitude nearest to the twenty-eighth degree of longitude west from the city of Washington, and by a line upon said latitude to the Mexican possessions, and bounded west and south by the said Mexican possessions, shall constitute a territory to be called the Indian Territory.

SEC. 2. *And be it further enacted*, That the said territory shall be forever hereafter reserved for the use of the various Indian tribes who may have a right to the same, and the faith of the United States is hereby pledged that all that part of the said territory which has been or may be granted to any of the Indian tribes, shall be, and the same is hereby, secured to them and their heirs and descendants forever, and the United States will cause a grant or patent to be made and executed for the same. And in case any two or more tribes shall unite and form a single tribe, the grants to such tribes shall enure to the benefit of such united tribe on such terms as such tribes shall agree upon: *Provided*, That such land shall revert to the United States, if the Indians, for whose benefit such grants have been or may be made, should become extinct, or abandon them.

SEC. 3. *And be it further enacted*, That each of the tribes residing within the said territory may establish and maintain such government for the regulation of their own internal affairs as to them may seem proper, not inconsistent with the constitution of the United States, or the laws thereof.

SEC. 4. *And be it further enacted*, That until otherwise provided by the people of the said territory, through the general council, and with the approval of Congress, a Governor of the said territory shall be appointed by the President, by and with the advice and consent of the Senate, who shall be, ex officio, superintendent of Indian affairs of said territory for the term of three years, and who shall take an oath of office, and shall receive, as governor and superintendent, an annual salary of three thousand five hundred dollars, which shall be in full of all charges, allowances, and emoluments of whatever nature or kind. And the said governor shall reside at such place within said territory as may be directed by the President of the United States, and shall execute such duties as may be enjoined by law, or as may be directed by the President.

SEC. 5. *And be it further enacted*, That a secretary of the said territory shall be appointed by the President, by and with the advice and consent of the Senate, for the term of four years, who shall take an oath of office, and shall receive an annual compensation of fifteen hundred dollars, which shall be in full of all charges, allowances, and emoluments of whatever nature or kind. And it shall be the duty of the said secretary to reside at the place appointed by the President of the United States for the residence of the governor. He shall keep a record of all the official proceedings of the governor of the said territory, and annually transmit copies of the same to both Houses of Congress. He shall also discharge the

duties of governor of said territory during the vacation of the office, or in the absence therefrom of the governor, and shall fulfil such other duties as shall be enjoined by law, or as may be directed by the President of the United States.

Sec. 6. *And be it further enacted*, That as soon as may be after his appointment, the said governor shall convene, at some proper point, a sufficient number of the chiefs, or other representatives of the various tribes who may reside within the said territory, and shall submit to them, for their assent, such of the provisions of this act as require the co-operation of the authorities of the respective tribes, in order to carry the same into effect, and such assent, if given, shall be in writing and in duplicate, one of which duplicates shall be transmitted to the War Department, and the other shall be preserved in the office of the said governor: *Provided*, The articles of confederation shall not be binding upon any tribe unless assented to by the chiefs of such tribe, being previously authorized thereto, or unless they shall be ratified by such tribe: *Provided, also*, That such confederation shall not take effect until the tribes assenting thereto shall, in the aggregate, number at least one-fourth of the whole amount, and that thereafter other tribes in said territory may join said confederacy, and become members thereof: *And provided, further*, That any tribe entering into this confederacy may, at any time, recede therefrom by giving six months' notice to the governor of their desire so to do, in the same manner as their assent to this act is required to be given, and the governor shall immediately inform the Secretary of War of the same.

Sec. 7. *And be it further enacted*, That a general council of the several tribes giving their consent, and forming the confederacy thus provided for, shall be annually held, at such time and place as may be fixed by the governor. The said council shall consist of not less than one, nor more than five delegates from any tribe, who shall be elected by the respective tribes, or selected from the existing chiefs in proportion to their numbers, which proportion shall be determined by the governor. The general council shall have power to make all needful regulations respecting the intercourse among the several tribes, to preserve peace, to provide for their common safety, and, generally, to enact such laws as the welfare of the confederation shall demand, and as may be necessary to give effect to the purposes of this act, not inconsistent with the constitution and laws of the United States. All the laws and regulations adopted by the said council shall be submitted to the governor, for his consideration, and shall have no force unless approved by him. The governor shall also have power to convene the said council upon extraordinary occasions, and at all times to adjourn it. And the members of the council shall, until otherwise provided, receive from the United States three dollars each, per day, during their attendance at the sessions thereof, and their reasonable expenses to be settled by the governor, in going to and returning therefrom: *Provided*, That nothing herein contained shall interfere with the right of the general government to regulate the trade and inter-

course between the United States, and the Indian tribes within said territory.

Sec. 8. *And be it further enacted*, That all officers and persons in the service of the United States, and all persons employed under treaty stipulations, and all persons travelling in, or through, said territory, and not residents thereof, shall be under the protection of, and subject to, the laws of the United States. And if any such officer or person shall, within said territory, commit any offence against the laws of any tribe of this confederacy, he may be tried and punished under the laws of said tribe; subject, however, to the approval of the governor, who may confirm or remit the said judgment, or remove such offender from the limits of said tribe: *Provided*, That, when the penalty be death, the judgment shall be forthwith communicated to the President, by the governor, who shall supend the execution thereof until the pleasure of the President be known. And whenever an Indian of one tribe, or any other person residing therein, except as above provided, shall commit a capital offence upon a member, or resident, of another tribe, he or she shall be apprehended, tried, and punished in such manner as shall be previously provided by the general council.

Sec. 9. *And be it further enacted*, That in accordance with pledges heretofore given by treaty, with some of the Indian tribes herein proposed to be erected into a territorial government; to promote their advancement, protect their interests, and bind them more closely to the government of the United States, it shall be competent for the said confederate tribes to elect, in such manner as the general council shall prescribe, a delegate to Congress, who shall have the same powers, privileges, and compensation as the delegates of the respective territories have.

Sec. 10. *And be it further enacted*, That it shall be lawful for any of the tribes entering into this confederacy, or the general council, to adopt, as the law of such tribe or confederacy, any, or all, of the prohibitory provisions of the laws of the United States regulating trade and intercourse with the Indians and Indian tribes, with such penalties as shall be approved by the governor, and establish tribunals for the trial of offenders against the same. And it shall be the duty of the governor to use all necessary means to carry the same into effect.

Sec. 11. *And be it further enacted*, That nothing in this act shall be construed as authorising or directing the violation of any existing treaty between the United States and any of the Indian tribes; nor shall anything in this act be construed as changing the relations now existing between the United States and any tribe within said territory, which shall not become a member of said confederacy.

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1848 U.S. Congress. House.
AUTHOR Committee on Indian
Affairs.
TITLE Indian Territory west of
the Mississippi.
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U58z SHELVED IN OKLAHOMA INDIAN COLLECTION
H8347i
1848

U.S. Congress. House. Committee
on Indian Affairs.

Indian Territory west of the
Mississippi.

APPENDIX 9 — Patent issued to the Cherokees, dated December 31, 1838.

COPY OF PATENT TO CHEROKEE NATION, DATED DECEMBER 31, 1838

PATENT.

THE UNITED STATES OF AMERICA

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS, by certain treaties made by the United States of America with the Cherokee Nation of Indians of the sixth day of May, one thousand and eight hundred and twenty-eight, the fourteenth of February one thousand eight hundred and thirty-three, and the twenty-ninth of December, one thousand eight hundred and thirty-five. It was stipulated and agreed on the part of the United States, that in consideration of the premises mentioned in the said treaties, respectively, the United States should guaranty, secure, and convey by patent to the said Cherokee Nation, certain tracts of land; the description of which tracts, and the terms and conditions on which they were to be conveyed, are set forth in the second and third articles of the treaty of the twenty-ninth of December, one thousand eight hundred and thirty-five, in the words following, that is to say:

Art. 2nd. WHEREAS, by the treaty of May 6th, one thousand eight hundred and twenty-eight, and the supplementary treaty thereto of February fourteenth, one thousand eight hundred and thirty-three, with the Cherokees west of the Mississippi, the United States guaranteed and secured, to be conveyed by patent to the Cherokee Nation of Indians the following tract of country: Beginning at a point on the old western territorial line of Arkansas territory, being twenty-five miles north from the point where the territorial line crosses Arkansas River; thence running

from said north point south on the said territorial line, where the said territorial line crosses Verdigris River; thence down said Verdigris River to the Arkansas; thence down said Arkansas to a point where a stone is placed opposite the east or lower bank of Grand River, at its junction with the Arkansas; thence running south forty-four degrees west one mile; thence in a straight line to a point four miles northerly from the mouth of the North Fork of the Canadian; thence along the said four mile line to the Canadian; thence, down the Canadian to the Arkansas, thence, down the Arkansas to that point on the Arkansas where the Eastern Choctaw boundary strikes said river, and running thence with the western line of Arkansas Territory, as now defined, to the southwest coner of Missouri; thence along the western Missouri line to the land assigned the Senecas; thence on the south line of the Senecas to the Grand River; thence up said Grand River, as far as the south line of the Osages reservation extended, if necessary; thence up and between said south Osage line, extended west if necessary; and a line drawn due west from the point of beginning to a certain distance west, at which a line running north and south from said Osage line to said due west line, will make seven millions of acres within the whole described boundaries. In addition to the seven millions of acres of land thus provided for and bounded, the United States further guarantee to the Cherokee Nation a perpetual outlet west and a free and unmolested use of all the country west of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extend, Provided, however, that if the saline or salt plain on the western prairie shall fall within said limits prescribed for said outlet, the right is reserved to the United States to permit other tribes of red men to get salt on said plain, in common with the Cherokees, and letters patent shall be issued by the United States as soon as practicable for the land hereby guaranteed. And WHEREAS, it is apprehended by the Cherokees that in the above cession there is not contained a sufficient

quantity of land for the accommodation of the whole nation, on their removal west of the Mississippi, the United States, in consideration of the sum of five hundred thousand dollars, therefore hereby covenants and agree to convey to the said Indians and their descendants, by patent, in fee simple, the following additional tracts of land, situated between the west line of the State of Missouri and the Osage Reservation, beginning at the southeast corner of the same, and runs north along the east line of the Osage Reservation, beginning at the southeast corner of the same, and runs north along the east line of the Osage lands fifty miles, to the northeast corner thereof; and thence east to the west line of the State of Missouri; thence with said line south, fifty miles; thence west to the place of beginning; estimated to contain eight hundred thousand acres of land but it is expressly understood, that if any of the lands assigned the Quapaws shall fall within the aforesaid bounds the same shall be reserved and excepted out of the lands above granted, and a pro rata reduction shall be made in the price to be allowed to the United States for the same by the Cherokees.

Art. 3. The United States also agree that the lands above ceded by the treaty of February fourteenth, one thousand eight hundred and thirty-three, including the outlet and those ceded by this treaty, shall all be included in one patent, executed to the Cherokee Nation of Indians by the president of the United States, according to the provisions of the act of May twenty-eighth, one thousand eight hundred and thirty. It is, however agreed that the military reservation at Fort Gibson shall be held by the United States. But should the United States abandon said post, and have no further use for the same, it shall revert to the Cherokee Nation. The United States shall always have the right to make and establish such posts and military roads and forts in any part of the Cherokee country, as they may deem proper for the interest and protection of the same, and the free use of as much land, timber, fuel and materials

of all kinds, for the construction and support of the same, as may be necessary; Provided that if the private rights of individuals are interfered with, a just compensation therefor shall be made.

And WHEREAS, the United States has caused the said tract of seven millions of acres, together with the said perpetual outlet to be surveyed in one tract, the boundaries whereof are as follows: Beginning at a mound of rocks four feet square at base and four and one-half feet high, from which another mound of rocks bears south one chain and another mound of rocks bears west one chain on what has been denominated the Old Western Territorial line of Arkansas Territory, twenty-five miles north of the Arkansas river; thence south twenty-one miles and twenty-eight chains to a post on the northeast bank of the Verdigris river, from which a hackberry fifteen inches diameter, bears south sixty-one degrees, thirty-one minutes east, forty-three links marked C.H.L. and a cottonwood forty-two inches diameter bears south twenty-one degrees fifteen minutes east, fifty links, marked C.R.K.L.; thence down the Verdigris river, on the northeast bank, with its meanders to the junction of Verdigris and Arkansas rivers; thence from the lower bank of the Verdigris river on the north bank of the Arkansas river, south forty-four degrees, thirteen minutes east, fifty-seven chains to a post on the south bank of Arkansas, opposite the eastern bank of Neosho river at its junction with Arkansas, from which a red oak thirty-six inches diameter, bears south seventy-five degrees, forty-five minutes west, twenty-four links, and a hickory, twenty-four inches diameter, bears south eighty-nine degrees, east four links; thence south fifty-three degrees west, one mile to a post from which a rock bears north fifty-three degrees east fifty links and a rock bears south eighteen degrees, eighteen minutes, west fifty links; thence south eighteen degrees, eighteen minutes west, thirty-three miles twenty-eight chains and eighty links, to a rock from which another rock bears north eighteen de-

grees eighteen minutes east, fifty links, and another rock bears south fifty links, thence south four miles to a post on the lower bank of the north fork of the Canadian river, at its junction with the Canadian river, from which a cottonwood, twenty-four inches diameter, bears north eighteen degrees east, forty links, and a cottonwood fifteen inches diameter, bears south nine degrees, east fourteen links; thence down the Canadian river on its north bank to its junction with Arkansas river; thence down the main channel of Arkansas river to the western boundary of the State of Arkansas, at the northern extremity of the eastern boundary of the lands of the Choctaws, on the south bank of the Arkansas river, four chains and fifty-four links east of Fort Smith; thence north seven degrees and twenty-five minutes west, with the western boundary of the State of Arkansas, seventy-six miles, sixty-four chains and fifty links to the southwest corner of the State of Missouri; thence north on the western boundary of the State of Missouri, eight miles, forty-nine chains and fifty links, to the north bank of Cow Skin or Seneca river at a mound six feet square at base and five feet high, in which is a post marked on the south side Cor. n. Ch. Ld.; thence west on the southern boundary of the lands of the Senecas, eleven miles and forty-eight chains to a post on the east bank of Neosho river, from which a maple eighteen inches in diameter bears south thirty-one degrees east, seventy-two links; thence up Neosho river, with its meanders, on the east bank, to the southern boundary of Osage lands, thirty-six chains and fifty links west of the southeast corner of the lands of the Osages, witnessed by a mound of rocks on the west banks of Neosho river; thence west on the southern boundary of the Osage lands; to the line dividing the territory of the United States from that of Mexico, two hundred and eighty-eight miles, thirteen chains and sixty-six links, to a mound of earth six feet square at base, and five and a half feet high, in which is deposited a cylinder of charcoal, twelve inches long and four inches diameter; thence south along the line of the territory of the United

States and of Mexico, sixty miles and twelve chains, to a mound of earth six feet square at base and five and a half feet high, in which is deposited a cylinder of charcoal, eighteen inches long and three inches diameter; thence east along the northern boundary of the Creek lands two hundred and seventy-three miles, fifty-five chains and sixty-six links, to the beginning; containing within the survey thirteen millions, five hundred and seventy-four thousand, one hundred and thirty-five acres and fourteen-hundredths of an acre. And whereas, the United States have also caused the said tract of eight hundred thousand acres to be surveyed and have ascertained the boundaries thereof to be as follows:

Beginning at the southeast corner of the Osage lands, described by a rock, from which a red oak, twenty inches diameter bears south twenty-seven degrees east, seventy-six links, and a burr-oak, thirty inches diameter, bears south fifty-nine degrees west one chain; and another burr-oak thirty inches diameter bears north eight degrees west, one chain and thirty-seven links; and another burr-oak forty inches in diameter bears north thirty degrees west, one chain and eighty-one links and running east twenty-five miles to a rock on the western line of the State of Missouri, from which a post oak ten inches diameter, bears north forty-eight degrees, thirty minutes east, four chains; and a post oak twelve inches diameter bears south sixty-two degrees east, five chains; thence north, with the western boundary of the State of Missouri, fifty miles, to a mound of earth five feet square at base and four and one-half feet high; thence west twenty-five miles to the northeast corner of the lands of the Osages, described by a mound of earth six feet square at the base and five feet high; thence south along the eastern boundary of Osage lands, fifty miles, to the beginning; containing eight hundred thousand acres.

Therefore in execution of the agreements and stipulations contained in the said several treaties, the United

States has given and granted, and by these presents do give and grant, unto the said Cherokee Nation, the two tracts of land, so surveyed and hereinbefore described, containing in the whole fourteen millions, three hundred and seventy-four thousand, one hundred and thirty-five acres, and fourteen-hundredths of an acre: To Have and To Hold the Same, together with all of the rights, privileges and appurtenances thereunto belonging to the said Cherokee Nation forever, subject, however, to the right of the United States to permit other tribes of red men to get salt on the salt plains on the western prairie, referred to, in the second article of the treaty of the twenty-ninth of December, one thousand eight hundred and thirty-five, which salt plain has been ascertained to be within the limits prescribed for the outlet agreed to be granted by said article; and subject also to all the other rights reserved to the United States, in and by the articles hereinbefore recited, to the extent, and in the manner, in which the said rights are so reserved; and subject also to the condition provided by the Act of Congress of the twenty-eighth of May, one thousand eight hundred and thirty; referred to in the above recited third article, and which condition is, that the lands hereby granted shall revert to the United States, if the said Cherokee Nation becomes extinct, or abandons the same.

IN TESTIMONY WHEREOF, I, MARTIN VAN BUREN, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, the thirty-first day of December, in the year of Our Lord, one thousand eight hundred and thirty-eight, and of the Independence of the United States, the sixty-third.

(SEAL) By the President, M. VAN BUREN.

(Signed) H. M. GARLAND, Recorder of the General Land Office.

APPENDIX 10—Chapter II, Mills' "Oklahoma Indian Land Laws," Thomas Law Book Co., 2d Edition, 1924.

OKLAHOMA INDIAN LAND LAWS

Second Edition

By Lawrence Mills

Published 1924

(Italics is by Counsel for Respondents)

CHAPTER II.

AUTHORITY OF CONGRESS OVER THE INDIANS

§ 4. Title by Discovery.
5. Relation of Indian Tribes to the United States.
6. Treaty with Indian Tribe Not a Contract.
7. United States Citizenship.
8. Authority of Congress, Plenary.

§ 4. **Title By Discovery.**—Upon its discovery by Europeans, America was in the exclusive possession of the Indians, a people in a state of barbarism, who lived by hunting, and practiced agriculture only in a most limited and primitive manner. To the minds of the Europeans, America was a virgin and unpeopled continent, and they found no difficulty in convincing themselves that the natives were more than compensated for the loss of their independence by the blessings of Christianity which they were able to bestow. Accordingly, the great nations of Europe lost no time in appropriating to themselves such parts of the new world as they were able to acquire. But as each of these nations was in pursuit of the same object, it was necessary, in order to avoid war and contentions between themselves, to establish a principle governing such acquisition that should be acknowledged and observed by them all. This principle was found in the doctrine that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments.

The relation between the discoverer and the Indians who inhabited the territory, did not concern the other European nations and became a matter of policy for each nation to determine for itself.

By each of the nations, England, France, Spain and Holland, who laid claims to parts of North America by virtue of the title of discovery, *the right of occupancy* was recognized in the Indians, but the ultimate dominion and sovereignty of the soil was asserted in themselves. Each asserted as a corollary of its claim of ultimate dominion, the exclusive prerogative to extinguish the Indians' right of occupancy and denied to all others the privilege of acquiring any interest in the soil by grant from the Indians.

As a result of the war by which the independence of America was achieved, the United States succeeded to all of the dominion, sovereignty and right which England had theretofore had to the soil of America, except Canada, and the rights of France and Spain were afterwards acquired by purchase. The title of the United States to the land occupied and claimed by the Indians is thus based upon conquest, but its validity is a political and not a judicial question, and the manner of its acquirement was recognized as legitimate by all of the civilized nations of the world. Chief Justice Marshall has summed up the question as follows:

"We will not enter into the controversy whether agriculturalists, merchants and manufacturers have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be respecting the original justice of the claim which has been successfully asserted. The British government, which was then our government, and whose rights have passed to the United States, asserted a title to all of the lands occupied by the Indians within the chartered limits of the British colonies. It asserted also a limited sovereignty over them and the exclusive right of extinguishing the title which oc-

cupancy gave to them. These claims have been maintained and established as far west as the Mississippi River by the sword. The title to a vast portion of the land we now hold, originates in them. It is not for the courts of this country to question the validity of this title or to sustain one which is incompatible with it."[1]

§ 5. **Relation of Indian Tribes to United States.**—The relation of the Indian tribes to the United States has from the beginning been of an anomalous and complex character. Though they occupied territory within the boundaries of the United States they were not a political part of the United States.[2]

Each tribe constituted a distinct, independent, political community, exercising within its territory and with respect to its internal affairs, all of the powers of local self-government and administering its own laws, customs and usages. It was, in every respect, a Nation, within the general acceptation of that term and capable of contracting treaties as such.[3]

But while the several tribes exercised all the attributes of sovereignty within their recognized tribal domains, they occupied territories to which a superior power asserted and maintained the ultimate dominion and the exclusive right to the soil upon the extinguishment of the right of occupancy conceded to the natives. The assertion of dominion by the United States was inconsistent with complete sovereignty in the Indian tribes, and the attempt of any foreign nation to enter into relations with them, or to acquire any interest in their lands, would be considered an invasion of the sovereignty of the United States and an act of hostility. By virtue of such claims of dominion, an Indian tribe was

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[1]Johnson v. McIntosh, 8 Wheaton, 574; 5 L. Ed. 541; Cherokee Nation v. Georgia, 5 Peters 48; 8 L. Ed. 25.

[2]In re Crow Dog, 109 U.S. 556; 27 L. Ed. 1030.

[3]Worcester v. Georgia, 6 Peters 575; 8 L. Ed. 483; Turner v. U.S., 248 U.S. 354; — L. Ed. —.

not, with respect to the United States, a foreign nation within the meaning of the provision of the Constitution giving the federal courts jurisdiction of controversies "between a State or citizens thereof, and foreign states, citizens or subjects," and it could not maintain a suit therein.[4]

Full authority and sovereignty over the Indian tribes has been exercised by the Federal government through Congress from the beginning varying in the extent of its application only by expediency or the power of the United States to enforce it. Such authority of the general government does not emanate from any particular section of the Constitution and is not derived from the provision granting it "power to regulate commerce with foreign nations, and among the several States and with the Indian tribes." It is much broader than that. It is an inherent one, arising from its political relations with those dependent people. This sovereignty of the government is exercised through Congress as the instrument established by the Constitution for the expression of its legislative will. Justice Miller in United States v. Kagama, has outlined the source of the authority of the Federal government over the Indian Tribes as follows:

"The power of the General Government over these remnants of a race, once powerful, now weak and diminished in numbers, is necessary to their protection as well as to the safety of those among whom they dwell. It must exist in that government because it never have existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its law on all the tribes."[5]

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[4]Cherokee Nation v. Georgia, 5 Peters 48; 8 L. Ed. 25; Cherokee Nation v. Southern Kan. Ry. Co., 135 U.S. 641, 34 L. Ed. 295; Choctaw Nation v. United States, 179 U.S. 494, 45 L. Ed. 291; United States v. Rogers, 4 Howard 572; 11 L. Ed. 1105; Jones v. Meechan, 175 U.S. 1, 44 L. Ed. 49.

[5]United States v. Kagama, 118 U.S. 375, 30 L. Ed. 228; Stephens v. Cherokee Nation, 174 U.S. 445, 43 L. Ed. 1041.

The tribes were declared by Chief Justice Marshall in Cherokee Nation v. Georgia, to be in a "state of pupilage," and their relation to the United States to be that of a ward to his guardian. Such designation has been generally adopted by the courts as expressive of the authority of the authority of the United States over the Indian tribes, who are usually referred to as "wards of the Nation," "pupils," "local dependent communities."

By reason of the relation between the United States and the tribes, the exercise of its authority is a political question, addressing itself solely to Congress and not subject to control by the courts. Congress has plenary power and authority over the tribes, tribal affairs and property when it sees fit to exercise it, and from the very nature of the relation, there is no authority above Congress that they can invoke.[6]

§ 6. **Treaty With Indian Tribe Not a Contract.**—It has been the practice of the United States from the beginning of the government to the present time to exercise its paramount authority over the Indians by treaties negotiated with the different tribes. Such treaties are not contracts and confer no vested rights upon the tribes which are within the protection of the Constitution. They are effective, not as treaties but as acts of Congress and do not impair the power of Congress to further legislate upon the same sub-

[6]United States v. Kagama, 118 U.S. 375, 30 L.E. 228; Cherokee Nation v. Southern Kan. Ry. Co., 135 U.S. 641, 34 L.E. 295; Choctaw Nation v. United States, 179 U.S. 494, 45 L.E. 291; Stephens v. Cherokee Nation, 174 U.S. 445, 43 L.E. 1041; United States v. Rogers, 4 Howard 572, 11 L.E. 1105; Ward v. Race Horse, 163 U.S. 504, 41 L.E. 244; In re Crow Dog, 109 U.S. 556, 27 L.E. 1030; M.K.&T. Ry. Co. v. Roberts, 152 U.S. 114, 38 L.E. 377; Thomas v. Gay, 169 U.S. 264, 42 L.E. 740; Cherokee Nation v. Hitchcock, 187 U.S. 298, 47 L.E. 183; Lone Wolf v. Hitchcock, 187 U.S. 553, 47 L.E. 299; Tiger v. Western Investment Co., 221 U.S. 285, 55 L.E. 738; Heckman v. United States, 224 U.S. 413, 56 L.E. 820; Gritts v. Fisher, 224 U.S. 639, 56 L.E. 928; Choate v. Trapp, 224 U.S. 665, 56 L.E. 941; Williams v. Johnson, 239 U.S. 414, 60 L.E. 358; 32 Okla. 247; Winton v. Amos, 255 U.S. 373, 65 L.E. 684.

ject matter, even in violation of the terms of the treaties. Whatever may be the moral obligation to keep inviolate the treaties entered into with the Indian tribes, the sovereignty of the United States cannot be concluded by its own legislative enactments, should occasion arise for the further exercise of its authority.[7]

Where, however, rights have vested in the individual as distinct from the tribe, under a treaty or act of Congress, such rights are within the protection of the Constitution and cannot be divested by subsequent act of Congress.[8]

§ 7. **United States Citizenship.**—The Indian tribes were not a political part of the United States, and prior to March 3, 1901, the members of the Five Civilized Tribes were not citizens of the United States. By the General Allotment Act of February 8, 1887, every Indian born within the United States to whom an allotment was made was declared to be a citizen of the United States with all the rights, privileges and immunities thereof. The Five Civilized Tribes were excluded from the General Allotment Act, but by Act of March 3, 1901, section 6 of that Act was amended by the insertion in the appropriate place, of the words "and every Indian in Indian Territory." By such amendment United States citizenship was bestowed upon all the members of the Five Civilized Tribes.[9]

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[7]Lone Wolf v. Hitchcock, 187 U.S. 553, 47 L.E. 299; Cherokee Tobacco v. United States, 11 Wall, 616, 20 L.E. 227; United States v. Kagama, 118 U.S. 375, 30 L.E. 228; Choctaw Nation v. United States, 179 U.S. 494, 45 L.E. 291; Stephens v. Cherokee Nation, 174 U.S. 415, 43 L.E. 1041; United States v. Rogers, 4 Howard 572, 11 L.E. 1105; Ward v. Race Horse, 163 U.S. 504, 41 L.E. 244; Thomas v. Gay, 169 U.S. 264, 42 L.E. 740; Cherokee Nation v. Hitchcock, 187 U.S. 298, 47 L.E. 183; Tiger v. Western Investment Co., 221 U.S. 286, 55 L.E. 738; Gritts v. Fisher, 224 U.S. 640, 56 L.E. 928; Choate v. Trapp, 224 U.S. 665, 56 L.E. 941.

[8]Choate v. Trapp, 224 U.S. 665, 56 L.E. 941; Jones v. Meehan, 175 U.S. 1, 44 L.E. 49.

[9]Godfrey v. Iowa Land & Trust Co., 21 Okla. 293, 95 Pac. 792; Heckman v. U.S., 224 U.S. 410, 56 L.E. 820; Wiley v. Edmondson, 43 Okla. 7, 133 Pac. 38.

They acquired State citizenship upon the admission of Oklahoma into the Union.[10]

§ 8. **Authority of Congress, Plenary.**—The plenary authority, often called guardianship, of Congress over the tribe, tribal affairs and tribal property, *authorizes, with or without* the consent of the tribe, the dissolution of the tribe, the distribution and allotment of the tribal property and the imposition of such restrictions upon the alienation of the lands of the members, wherever and in such manner, as Congress may in its judgment deem expedient.[11]

The passage of the Act of June 28, 1898 (Curtis Act), was a valid exercise of the legislative authority of Congress over the Five Civilized Tribes.[12]

And the authority of Congress to distribute and allot the lands of the tribes in severalty to the members thereof necessarily included the authority to ascertain and declare who should constitute the membership of the tribes and share in the distribution of the land.[13]

And as a part of its plan of allotment in severalty and for the purpose of protecting the Indians in the enjoyment of their lands, it was authorized to impose upon the land of the individual members limitations or restrictions upon its alienability.[14]

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[10]Tiger v. Western Investment Co., 221 U.S. 285, 55 L.E. 738; Chisholm v. Creek & Indiana Development Co., 273 Fed. (DC) 589.

[11]Lone Wolf v. Hitchcock, 187 U.S. 553, 47 L.E. 299; Cherokee Nation v. Hitchcock, 187 U.S. 208, 47 L.E. 183; Tiger v. Western Investment Co., 221 U.S. 285, 55 L.E. 738; Heckman v. United States, 224 U.S. 413, 56 L.E. 820.

[12]Stephens v. Cherokee Nation, 174 U.S. 445, 43 L.E. 1041; Cherokee Nation v. Hitchcock, 187 U.S. 294, 47 L.E. 183.

[13]Gritts v. Fisher, 224 U.S. 640, 56 L.E. 928.

[14]Tiger v. Western Investment Co., 221 U.S. 285, 55 L.E. 738; Williams v. Johnson, 239 U.S. 414, 60 L.E. 358; Brader v. James, 49 Okla. 734, 154 Pac. 560, 246 U.S. 88, 62 L.E. 335.

Nor was its power exhausted when the land was alloted in severalty subject to the restrictions it had imposed. Such allottees, with respect to their allotted lands are still tribal Indians and subject to the guardianship of Congress until that guardianship shall be terminated by Congress itself; and it is for it to say when and under what conditions that guardianship shall cease. Accordingly, it has been held that the United States may maintain suits in its own name for the purpose of enforcing the restrictions it has imposed upon the alienation of the lands of the allottees of the several tribes.[15]

It may remove the restrictions prior to the expiration of the time originally prescribed.[16]

Or extend the restricted period beyond the original term.[17]

Or impose restrictions upon lands, which were at the time subject to unrestricted alienation.[18]

And such power in Congress is not inconsistent with United States citizenship in the Indians or affected by such citizenship.[19]

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[15]Heckman v. United States, 224 U.S. 413, 56 L.E. 820; Mullen v. United States, 224 U.S. 448, 56 L.E. 834; Goat v. United States, 224 U.S. 458, 56 L.E. 841; Deming Investment Co. v. United States, 224 U.S. 471, 56 L.E. 847.

[16]Williams v. Johnson, 239 U.S. 414, 60 L.E. 358, 32 Okla. 247, 122 Pac. 485; McIntosh v. Dill, 86 Okla. 1, 205 Pac. 917.

[17]Heckman v. United States, 224 U.S. 413, 56 L.E. 820; Tiger v. Western Investment Co., 221 U.S. 285, 55 L.E. 738.

[18]Brader v. James, 49 Okla. 734, 154 Pac. 560, 246 U.S. 88, 62 L.E. 335.

[19]Tiger v. Western Investment Co., 221 U.S. 286, 55 L.E. 738; Heckman v. United States, 224 U.S. 413, 56 L.E. 820; Choate v. Trapp, 224 U.S. 665, 56 L.E. 941; Brader v. James, 49 Okla. 734, 154 Pac. 560, 246 U.S. 88, 62 L.E. 335; Winton v. Amos, 255 U.S. 373, 65 L.E. 684.